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IN THE
Supreme Court of the United States

TINA CONDER,

Petitioner,

v.

RDI/CAESARS RIVERBOAT CASINO, INC.
and M/V GLORY OF ROME,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
INDIANA COURT OF APPEAL

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should the definition of "vessel" found in 1 U.S.C.A. § 3, as established in *Stewart*, be reaffirmed to apply to all aspects of maritime law in order to promote uniformity of maritime law among the various circuits and states?

2. Should objective standards be required for use in determining whether or not a vessel is permanently moored, i.e., permanently withdrawn from navigation?

3. Is status as a worker covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., required to assert a Sierecki seaman claim for general maritime law damages?

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Judgement Reversed in Part by

RDI/Caesars Riverboat Casino, Inc. v. Conder, 896 N.E.2d 1172, 2008 A.M.C. 2861 (Ind. App. Nov. 25, 2008) (No. 31A04-0802-CV-40)

Appeal after Remand

Conder v. RDI/Caesars Riverboat Casino, Inc., 918 N.E.2d 759, 2010 A.M.C. 763 (Ind. App. Dec 31, 2009) (No. 31A01-0907-CV-348), *transfer denied* (Apr 15, 2010)

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

(i) The judgment sought to be reviewed was entered on December 31, 2009 by the Indiana Court of Appeal.

(ii) No request for rehearing was sought in the Indiana Court of Appeal; a Petition to Transfer to the Indiana Supreme Court was denied on April 15, 2010.

(iii) This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

1 U.S.C. § 3. "Vessel" as including all means of water transportation.

The word "vessel" includes every description of watercraft or other artificial contrivance used or capable of being used, as a means of transportation on water.

33 U.S.C. § 905. Attached in Appendix.

STATEMENT OF THE CASE

A. Statement of Facts

On or about August 19, 2003, and on numerous subsequent occasions, Tina Conder (hereinafter "Ms. Conder") suffered severe injuries after being repeatedly bitten by fleas during the course of her employment onboard the M/V GLORY OF ROME. Treatment for her adverse reaction to these flea bites included large doses of steroids which caused her to have a heart attack. At the time she was bitten by fleas, Ms. Conder was employed by Caesars as a dealer permanently assigned to the M/V GLORY OF ROME . As such, she was a member of the vessel crew and performed the vessel's work at all pertinent times. On April 26, 2005, Ms. Conder filed a Seaman's Complaint against Appellants/ Defendants RDI/Caesars Riverboat Casino, LLC, and the M/V GLORY OF ROME (hereinafter "Caesars") based on admiralty and general maritime law and the Jones Act, 46 U.S C. § 688.

The M/V GLORY OF ROME is a passenger vessel registered with and regularly inspected by the U.S. Coast Guard. The M/V GLORY OF ROME has its own engines and machinery as well as navigation equipment, lifesaving equipment, and fire fighting equipment. Certificates of Financial Responsibility were issued by the U.S. Coast Guard to show that this vessel has pollution liability coverage.

The M/V GLORY OF ROME was not built to be a work platform. The U.S. Coast Guard's automated information system, the Port State Information Exchange, identifies the M/V GLORY OF ROME as an inspected passenger vessel. The American Bureau of Shipping website identifies the M/V GLORY OF ROME as a passenger casino vessel. The M/V GLORY OF ROME has not applied for permanently moored status.

In order to facilitate operation of the M/V GLORY OF ROME, Caesar's has, at all pertinent times, contracted with Hornblower Marine Services. The website for Hornblower demonstrates that their contract with Caesars includes initiation and management of emergency drills, U.S. Coast Guard inspection/certification, crew hiring, and day-to-day marine operations of the M/V GLORY OF ROME. The M/V GLORY OF ROME is subject to the hazards of navigation and has been struck by a breakaway barge. It still occupies the same mooring site that it used at the time of the barge accident. Should Caesars decide to sail the M/V GLORY OF ROME, it can be ready to sail in a matter of hours.

B. Court Proceedings

On April 26, 2005, Tina Conder filed a Seaman's Complaint against RDI/Caesars Riverboat Casino, LLC, and the M/V GLORY OF ROME based on admiralty and general maritime law and the Jones Act, 46 U.S.C. § 688. In the event she was adjudged not to be a seaman, and, instead, subject to Indiana's workers' compensation laws, Ms. Conder also alleged in the alternative a claim as a seaman pro hac vice, i.e., a Sieracki seaman, doing the work of the vessel. Caesars filed its answer and affirmative defenses on October 27, 2004.

On March 26, 2007, Caesars filed a motion to dismiss. On May 15, 2007, Ms. Conder filed a motion for partial summary judgment seeking to have the court declare her a seaman within the meaning of the Jones Act.

On December 4, 2007, Judge H. Lloyd Whitis ordered that Ms. Conder's Motion for Partial Summary Judgment be granted and that Caesars Motion to Dismiss be denied.

In an Interlocutory appeal, on November 25, 2008,reported at 896 N.E.2d. 1172, a panel of the Indiana Court of Appeals held that the M/V GLORY OF ROME was not a vessel in navigation for Jones Act purposes and that Ms. Conder was not a Jones Act seaman. On April 4, 2009, following defendant's filing of a motion to dismiss, the trial court entered a Dismissal of Ms. Conders Jones Act claims.

On June 1, 2009, the trial court entered an Order dismissing the remaining claims following an additional Motion to Dismiss filed by defendants. The Court of Appeals, in a decision issued on December 31, 2009 and reported at 918 N.E.2d. 759, declined to reconsider its prior decision and furthermore held that Ms. Conder was not a longshoreman nor engaged in maritime employment and therefore not eligible for a Sieracki seaman general maritime claim.

From this decision petitioner attempted a Petition to Transfer the matter to the Indiana Supreme Court which petition was denied on April 15, 2010 and from which decision this writ arises.

REASONS FOR GRANTING THE PETITION

1. **Should the definition of a vessel found in 1 U.S.C. § 3, as established in *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005), apply to all aspects of maritime law in order to promote uniformity of maritime law among the various circuits and states?**

A review of the jurisprudence pertaining to vessels "in navigation" reveals a smorgasbord of theories resulting in decisions which can be described as confusing at best. Not only are there conflicting opinions between the circuits but within the very circuits themselves. It is conceivable that such divergent holdings could leave an injured party without any remedy whatsoever.

The bulk of the conflicting decisions pertain to employees aboard riverboat casinos. The ultimate conflict has been narrowed to whether or not the vessel in each case is a vessel "in navigation." In determining whether or not a claimant is a seaman on a vessel in navigation at the time of his or her injury, the results have been inconsistent to say the least. Under 7th Circuit jurisprudence, a claimant can be deemed a seaman for purposes of the FLSA (*See Harkins v. Riverboat Services, Inc.*, 385 F.3d 1099 (7th Cir. 2004) and yet the same claimant, if injured on the vessel, will be deemed not a seaman for purposes of the Jones Act. (*See Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004). However, riverboat casino workers have been found to be seamen for purposes of the Jones Act, and as such, they were covered by compensation statute enacted by Congress and not covered by state Workers' Compensation Act for injuries sustained while employed on riverboats. *Harvey's Casino v. Isenhour*, 724 N.W.2d 705 (Iowa,2006).

The 7th Circuit has suggested that where riverboat casino employees are concerned, there is a distinction between the vessel's maritime crew and the casino workers. *Harkins v. Riverboat Services, Inc.*, 385 F.3d 1099, 1103 (7th Cir. 2004). Other courts have declined to make such a distinction in finding that dealers and other gaming-related employees on casino boats (Conders's job) were Jones Act seamen. *See Frederick v. Harvey's Iowa Management Co., Inc.*, 177 F. Supp. 2d 933 (S.D. Iowa 2001), *Long v. Diamond Jo Casino*, 2000 WL 876908 (N.D. Ill), 2000 A.M.C. 2456. *See also Knight v. Grand Victoria Casino*, (Not reported in F. Supp. 2d) 2000 WL1434151 (N.D. Ill.) (reasonable trier of fact could

conclude that dealer's connection to vessel was substantial enough to put her under the Jones Act's protective umbrella); *Harvey's Casino v. Isenhour*, 724 N.W.2d 705 (Iowa, 2006) (Riverboat casinos' slot-machine attendant, banker, and floor host were "seamen" for purposes of federal Jones Act).

Riverboat casino employees were almost universally accepted as seamen and entitled to the benefits of the Jones Act until several states rescinded previous legislation requiring casino boats to regularly cruise upon navigable bodies of water. The state legislatures decided that these vessels would no longer be required to sail and could conduct their gambling activities dockside.

The resulting litigation, subsequent to the relaxation of the sailing requirement, has now evolved to a point where, in effect, the state legislatures have usurped well-established federal maritime law.

Some courts have held that since the vessels are no longer required to sail they are no longer vessels in navigation. *See for example, Hertz v. Treasure Chest Casino, L.L.C.*, 274 F. Supp. 2d 795 (E.D. La. 2003); *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185 (5th Cir. 2006); *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004); *RDI/Caesars Riverboat Casino, Inc. v. Conder*, 896 N.E.2d 1172 (Ind. App. 2008).

Other courts have held that said boats continue to be vessels in navigation. *See for example Board of Com'rs of Orleans Levee Dist. v. M/V BELLE OF*

ORLEANS, 535 F.3d 1299 (11th Cir. 2008) (involving maritime liens for wharfage fees); *Booten v. Argosy Gaming Co.*, 364 Ill. App. 3d 697, 848 N.E.2d 141 (Ill. App. 5 Dist. 2006). *Luckhart v. Southern Ill. Riverboat/ Casino Cruises Inc.*, 2010 WL 2137451 (S.D. Ill. 2010).

As previously stated some courts in the same circuit have found these boats to be in navigation in one instance and not to be in navigation in other instances. Also as previously stated, they have found these floating casino employees to be Jones Act seamen when making a claim under one statute while not considered seamen when making a claim under a different statute such as the FSLA, resulting in what best can be described as chaos.

At the outset it should be noted that the state legislatures themselves merely stated that these vessels are no longer required to sail but make no mention whatever as to the seaman status of the casino employees or as to vessel status.

Perhaps the most definitive case addressing this virtual buffet of jurisprudence is *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005).

This Honorable Court in *Stewart* attempted to establish some unanimity when deciding these type of cases but confusion and conflict reign nevertheless.

Stewart basically established the definition of a "seaman" under the LHWCA or under the Jones Act as being defined as follows at page 487:

> First, "seaman" is a term of art that had an established meaning under general maritime law. We have thus presumed that when the Jones Act made available negligence remedies to [a]ny seaman who shall suffer personal injury in the course of his employment," Congress took the term "seaman" as the general maritime law found it. *488
>
> Second, Congress provided further guidance in 1927 when it enacted the LHWCA, which provides scheduled compensation to land-based maritime workers but which also excepts from its coverage "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). This exception is simply "a refinement of the term 'seaman' in the Jones Act." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991). Thus, the Jones Act and the LHWCA are complementary regimes that work in tandem: The Jones Act provides tort remedies to sea-based maritime employees. *Ibid., Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 6-7, 66 S.Ct. 869, 90 L. Ed. 1045 (1946).
>
> Still, discerning the contours of "seaman" status, even with the general maritime law and the LHWCA's language as aids to interpretation, has not been easy.

> *See Chandris, supra*, at 356, 115 S.Ct. 2172. We began clarifying the definition of "seaman" in a pair of cases, ** *McDermott Int'l, Inc. v. Wilander, supra*, and *Chandris, supra*, that addressed the relationship a worker must have to a vessel in order to be a "master or member" of its crew.

As a casino boat employee (table games dealer), Ms. Conder clearly meets the requirement that the worker contribute to the "function" of the vessel or the accomplishment of its mission. Because the "function" and/or "mission"of a riverboat casino is to provide entertainment and games of skill and chance, casino employees necessarily contribute to that function. Prior to and subsequent to the *Stewart* case a member of a crew has been defined as any employee who contributes to or furthers the mission of the vessel. It has long been established that casino employees aboard riverboats function in that capacity. *See for example, Bailey v. Aztar Indiana Gaming Corp.*, 2005 WL 4880620, *2 (S.D. Ind.) (river boat's mission was gambling), *Lara v. Harvey's Iowa Management Co., Inc.*, 109 F. Supp. 2d 1031, 1036 (S.D. Iowa 2000) (bartender's work directly supported riverboat's money-making and entertainment function), *Harvey's Casino v. Isenhour*, 724 N.W. 2d 705, 709 (Iowa App. 2006) ("the mission of the riverboats was to provide gambling for its patrons and that these claimants contributed to that function.").

The *Stewart* court also defined a "vessel" as follows at page 489:

> "In determining the meaning of the revised statutes, or any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, . . . [t]he word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 18 Stat., pt. 1, p. 1.
>
> Sections 1 and 3 show that, because the LHWCA is an Act of Congress passed after February 25, 1871, the LHWCA's use of the term "vessel" "includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." *Ibid.*

The M/V GLORY OF ROME meets the classic definition of a vessel as it is a water-craft capable of being used as a means of transportation on water. The M/V GLORY OF ROME was built with one single purpose in mind, to transport passengers and gaming equipment on the Ohio River. The Coast Guard's automated information system identifies the M/V GLORY OF ROME as an inspected passenger vessel. (*See* <http://cgmix.uscg.mil/PSIX>). The American Bureau of Shipping identifies the M/V GLORY OF ROME as a passenger casino vessel. (*See* <http://absapps.eagle.org>). The M/V GLORY OF ROME has a fully functioning wheelhouse, functioning engines rendering it fully capable of self-propulsion, life-saving equipment,

navigation aids, and a crew. It can not be seriously denied that the M/V GLORY OF ROME is a vessel under long established federal maritime law.

We now arrive at the contentious issue of whether or not a vessel is "in navigation", particularly as it applies to riverboat casino vessels. The single issue that has led us down this calamitous path is the action of the various state legislatures that rescinded prior statutes mandating that these casino boats be required to sail. That is all that the state legislatures legislated. However, these simple legislative acts have devolved into a morass of conflicting and confusing jurisprudence.

As previously stated some courts have held that the determination of whether or not a gambling boat is in navigation depends upon the intent of the shipowner and whether or not the vessel is indefinitely or permanently moored. Other courts have held that these vessels are not in navigation only when they have been permanently moored.

Further confusion has resulted when the courts have attempted to make a distinction between indefinitely and permanently moored. Some courts have held that a vessel is permanently moored when it is only theoretically capable of sailing but not permanently moored when it is practically able to sail.

Additional confusion arose when other courts have totally ignored the accepted meaning of the words permanent and indefinite and have allowed the shipowners by the mere use of an affidavit to convert an indefinitely moored vessel to the status of a

permanently moored vessel, thereby creating a favored class of litigants.

As previously stated the primary issue in this matter was whether or not the GLORY OF ROME was in navigation at the time of Ms. Conder's injury. A review of the Stewart decision as rendered by this Honorable Court would lead to no other conclusion than that it was.

Petitioner argues that the GLORY OF ROME qualifies as a "vessel" in that it is a watercraft used, or capable of being used, as a means of transportation on water as required by *Stewart*. The *Stewart* decision specifically states that a watercraft is not required to be used primarily for that purpose, although that was the primary purpose of the GLORY OF ROME prior to the "no sailing" statute passed by the State of Indiana.

In discussing whether or not a watercraft is capable of being used for maritime transport in any meaningful sense the *Stewart* court stated the following at page 493 B:

> [2] Cope and Evansville did no more than construe § 3 in light of the distinction drawn by the general maritime law between watercraft temporarily stationed in a particular location and those permanently affixed to shore or resting on the ocean floor. *See, e.g., The Alabama*, 19 F. at 546 (noting that vessels possess "mobility and [the] capacity to navigate," as distinct from fixed structures like wharves, drydocks, and bridges). Simply put, a watercraft is not

"capable of being used" for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.

This distinction is sensible: A ship and its crew do not move in and out of Jones Act coverage depending on whether the ship is at anchor, docked for loading or unloading, or berthed for minor repairs, in the same way that ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again. *See Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (C.A. 5 1995) (floating casino was no longer a vessel where it "was moored to the shore in a semi-permanent or indefinite manner"); *Kathriner v. UNISEA, Inc.*, 975 F.2d 657, 660 (C.A. 9 1992) (floating processing plant was no longer a vessel where a "large opening [had been] cut into her hull," rendering her incapable of moving over the water). Even if the general maritime law had not informed the meaning of § 3, its definition would not sweep within its reach an array of fixed structures not commonly thought of as capable of being used for water transport. *See, e.g., Leocal v. Ashcroft, ante*, 543 U.S. at 9, 125 S.Ct. 377, 382, 60 L.Ed.2d 271 ("When interpreting a statute, we must give words their 'ordinary or natural' meaning" (*quoting Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993)).

It is clear that a watercraft is capable of being used for maritime transport or in navigation unless it has been permanently moored or otherwise rendered practically incapable of transportation or movement. The GLORY OF ROME was not so encumbered. It was neither permanently moored nor rendered practically incapable of transportation or movement.

In fact, as evidenced by Ms. Conder's affidavit filed in her opposition to the motion for summary judgment the GLORY OF ROME did, in fact, sail on several occasions subsequent to the implementation of the "no sailing" legislation. Not that any such sailing would be necessary, under *Stewart*, as long as the watercraft is capable of being used as transport upon navigable waters.

The *Stewart* court used the *Kathriner* case as an example of a permanently moored vessel, but a large opening had been cut into the hull of the KATHRINER which obviously rendered it incapable of being used for water transport. Not so in the instant matter.

Pavone is also distinguishable in that the involved floating structure, the BILOXI BELLE, had not been built as nor been used as a seagoing vessel to transport passengers, cargo, or equipment across navigable waters. The BILOXI BELLE employed no navigational or nautical crew. It had no engine, no captain, no navigational aids, no crew quarters, and no lifesaving equipment. It was outfitted with a decorative pilot house containing no operating parts other than a single light switch. The faux pilothouse contained no steering mechanism and was decorated with an antique wheel

purely for aesthetic purposes. Decorative ring buoys on the Biloxi Belle were purely for visual effect and were not intended for lifesaving use. There was a motorized, but nonfunctional, paddlewheel affixed to the Biloxi Belle. The wheel rested permanently above the water level and served no propulsion function. *See Pavone v. Mississippi Riverboat Amusement, Ltd.*, 52 F.3d 560, 564 (5th Cir. 1995).

From its very inception the BILOXI BELLE was meant to be permanently and, in fact was, moored to shore by steel lines affixed to sunken steel pylons that were filled with concrete. The first level of the BILOXI BELLE was connected to the pier by steel ramps, and the second level was joined to a shore-side building. In addition, numerous shore-side utility lines-telephone, electric, gas, sewer, domestic fire and water, cable TV, and computer-were connected permanently (or at least indefinitely) to the BILOXI BELLE. *See Pavone v. Mississippi Riverboat Amusement, Ltd.*, 52 F.3d 560, 564 (5th Cir. 1995). Obviously it was never required to sail nor was there any intent other than to permanently anchor the structure as a permanent casino sitting on a navigable body of water only because it was required to be so situated. It never possessed the qualities of a floating vessel, never acquired Coast Guard certification, never had a maritime crew and certainly never had the intent of transporting patrons.

For all practical purposes, indefinitely moored in the *Pavone* case is identical to permanently moored insofar as the indefinite mooring of the *Pavone* vessel rendered it practically not capable of ever sailing. The indefinite mooring in the *Pavone* case is proven by objective facts,

that is, i.e., the lack of navigational equipment and crew and the permanency of the mooring process.

Such is not the case as it pertains to the GLORY OF ROME as the so-called indefinite mooring was not proven by objective facts as in the *Pavone* case but merely by a self-serving declaration in the form of an affidavit filed by a biased party to the litigation. By allowing a vessel to be considered indefinitely moored by a subjective affidavit the courts are allowing fully navigational vessels to sail in and out of Jones Act coverage, a practice which this court does not condone.

The courts that have accepted this practice are allowing fictionalized mooring and have relegated fully operational navigable vessels to the status of a fictionalized non-vessel. By doing so the casino owners have been allowed to bypass the procedures regularly required to decommission a vessel and instead by use of an affidavit (usually prepared after the event giving rise to the litigation) fictionally decommission the casino vessels.

The no sailing legislation enacted by state legislatures resulting in the fictionalized inactive status of a fully manned vessel should not determine vessel status, but rather, the body of federal maritime law, as shaped by the federal courts that has evolved over the years.

The GLORY OF ROME was initially designed and built to be a cruising, gaming casino, transporting persons across navigable waters, possessing all of the attributes of a vessel in navigation and did, in fact,

perform the functions of a cruising vessel for many years. At the time of Ms. Conder's injury, the GLORY OF ROME was fully staffed and crewed, was in a constant state of maintenance and readiness and was ready to cruise by simply casting away the mooring lines and cables which temporarily confined it to the dock.

The restraint on cruising is a paper restraint, a state statute, which does nothing to physically restrain the vessel from navigating the waters of the Ohio River, nor to relieve the vessel of its obligation to furnish a ship-shape seaworthy vessel with a qualified crew in order to pass Coast Guard inspections and to maintain Coast Guard certification. Furthermore, it does nothing to eliminate the perils of the sea that its employees face daily.

While docked, the M/V GLORY OF ROME remains afloat in navigable waters and still faces certain unique maritime perils including taking on water and possibly sinking; people falling overboard; the continuous peril of fires and it is also subject to the wake created by other watercraft traversing the Ohio River not to mention its exposure to being struck by other watercraft.

It only takes one collision to expose passengers or crew aboard the GLORY OF ROME to injuries resulting from the collision itself and/or possibly from their falling overboard and possibly drowning or sustaining serious injury.

In sum, the GLORY OF ROME completely possesses all of the attributes required, both theoretically and factually of a riverboat gambling vessel capable of plying navigable waters.

The GLORY OF ROME, in addition to its gambling function, also provides entertainment and serves alcoholic beverages aboard the vessel.

It is certainly reasonable to expect that a patron will imbibe too much alcohol, became unsteady on his feet and risk the possibility of falling overboard into the Ohio River, a navigable body of water. Even though the vessel has not moved from its moored position, the passengers face the same perils they would have faced had all taken place in the same water while not in a moored state.

In effect, while the GLORY OF ROME is moored, it may not be navigating but it is in navigation.

The divergent holdings by the various circuit courts of appeal have effectively reduced the distinction between vessels that are theoretically capable of navigating, practically capable of sailing, remotely capable of sailing, permanently docked and indefinitely docked. Depending upon which court is speaking, each one of those terms have different meanings and some are used interchangeably. There is no uniformity and even the same courts have applied different meanings to the same terms.

2. **Should objective standards be required for use in determining whether or not a vessel is permanently moored, i.e., permanently withdrawn from navigation?**

Indeed, the jurisprudence has devolved to such a point where a preferred class of litigants have now been established who can now determine the fate of thousands of casino employees by merely filing a self-serving affidavit supposedly proving "intent" without having to provide any objective evidence whatsoever in support of their self-serving declarations.

This lack of jurisprudential unanimity leaves claimants helpless and the determination of their fate left entirely within the whims of shipowners who can deny legitimate remedies to a whole class of litigants by merely filing a self-serving declaration which benefits their self interest.

Some courts have totally ignored the accepted meaning of the words permanent and indefinite and have allowed the shipowners by the mere use of an affidavit to convert an indefinitely moored vessel to the status of a permanently moored vessel. *See Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004). It is then entirely conceivable that a shipowner will file an affidavit today stating his vessel is indefinitely or permanently moored and if it sails the next week for whatever reason will claim that his intent at the time he made the affidavit was to keep his vessel indefinitely or permanently moored at that time.

While Caesars may claim that the M/V GLORY OF ROME is indefinitely moored and there are no intentions for her to sail again, Caesars intentions may also change in ways that are unanticipated at this time. Influenced by a change in public sentiment, Indiana law could change and once again require cruising. Should a more populated county in Indiana allow gaming or should Kentucky enact gaming laws, there is nothing preventing Caesars from simply unmooring the M/V GLORY OF ROME and sailing off to a more lucrative market. Caesars stated in open court that it could not definitively state how long in the foreseeable future the M/V GLORY OF ROME would remained moored and that the vessel could move to Kentucky should that state allow gaming in the future.

The owner's intentions with regard to a boat are analogous to the boat's "purpose," and *Stewart* clearly rejected any definition of "vessel" that relies on such a purpose. Such a test is incompatible with the Supreme Court's focus on providing uniformity within admiralty jurisdiction. *See Board of Com'rs of Orleans Levee Dist, supra*, *9.

As pointed out by the Eleventh Circuit in *Board of Com'rs of Orleans Levee Dist., supra*, *10, an owner's intentions may change in ways never anticipated. The Eleventh Circuit looked to the *Star of India, Luna v. Star of India*, 356 F.Supp. 59, 66 (S.D. Cal. 1973) for an example. In 1973, the Southern District of California rejected the U.S. Coast Guard's designation of the M/V STAR OF INDIA as permanently moored and her owner's statement that he did not intend to sail her again, and, instead, declared her subject to admiralty

jurisdiction. A mere three years later, the M/V STAR OF INDIA was put to sea for the first time in fifty years, and she continues to sail annually.

Mental reservations have no place in the law when it adversely affects the rights of hundreds of claimants. Self serving affidavits made by parties furthering their self interests are hardly reliable.

Objective criteria rather than the vessel owner's subjective intent have been and should be used to determine whether a riverboat casino is permanently moored. The appellate courts of several states have identified key factors that influenced their determination that the ability of a moored casino boat to cruise remained a practical possibility rather than a merely theoretical possibility: (1) the boat was in compliance with all Coast Guard regulations pertaining to a passenger vessel and was inspected by the Coast Guard, (2) the boat maintained a full maritime crew and was equipped with a motor, fuel, and everything necessary for navigation, (3) the boat could be disconnected from its mooring cables and cruising within a relatively brief time period, (4) the boat actually navigated, and (5) the boat had not applied for permanently moored status. *See Booten v. Argosy Gaming Co.*, 848 N.E. 2d 141, 145-146 (Ill. App. 5 Dist. 2006), *Harveys Casino v. Isenhour*, 713 N.W.2d 247, 2006 WL 228921, *3-4 (Iowa App.), *Davis v. Missouri Gaming Co.*, 51 S.W. 3d 168, 174-75, 177 (Missouri Ct. App. W.D. 2001).

In *Booten v. Argosy Gaming Co.*, 848 N.E.2d 141 (Ill. App. 5th District 2006), the Court of Appeals ruled that a casino boat that "actually navigates the Mississippi River approximately five times per year when it is released from its mooring and spun around to remove accumulated drift materials" was a vessel in navigation for purpose of the Jones Act. *Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 145-46 (Ill. App. 5th District 2006). The vessel in question left its mooring for de-drifting approximately five times per year. During this process the boat was spun two or three times to dislodge any accumulated drift materials. The boat then returned to its mooring. Despite no longer cruising, the vessel always had fuel on board and remained fully capable of navigating the river. Defendant had never applied for permanent mooring status. The boat was required to comply with all Coast Guard regulations for a passenger vessel. The boat was inspected every 90 days by the Coast Guard to ensure compliance with regulations. When customers are on board, a full marine crew must also be on board. The boat employed a senior captain, 3 captains, 4 engineers, 4 mates, and 21 deck hands and remained a licensed passenger vessel. *See Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 142-43 (Ill. App. 5th District 2006).

In reaching its decision, the *Booten* court examined *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004) and noted that the district court determined the casino was, in fact, permanently moored based upon statements made by defendant's agent that it intended to permanently moor the casino. *See Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 144, (Ill. App. 5th Dist. 2006). The *Booten*

court pointed out that in accepting the trial court's findings that the vessel in question was permanently moored and thus concluding that the vessel was no longer in navigation, the *Howard* court discounted the weight of actions by the defendant which were contrary to that determination. *See Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 1444, (Ill. App. 5th Dist. 2006). The Seventh Circuit merely relied on the self-serving statement by the defendant's agent that it did not intend to cruise the vessel. *See Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 144 (Ill. App. 5th Dist. 2006).

The *Booten* court noted that the defendant never relinquished its certificate of inspection from the Coast Guard, nor did it apply for permanent mooring status. *See Booten v. Argosy Gaming Co.*, 848 N.E.2d 141, 144 (Ill. App. 5th Dist. 2006). The key factual scenario noted by the Booten court is also present in the matter now before this court. Caesars has offered no proof that the M/V GLORY OF ROME is permanently moored other than a self-serving statement that it does not intend to cruise. The M/V GLORY OF ROME continues to be inspected by the Coast Guard, is fully crewed, always has fuel on board, remains fully capable of navigating the river, and has not been granted permanently moored status.

Therefore, there are established guidelines which should be followed to convert a vessel from the status of "in navigation" to one "not in navigation". A definition that is not unequivocal, based on objective actions and that does not rely on the whim of a biased litigant should determine status and not the mere use of a subjective self-serving affidavit.

If a casino owner/shipowner truly intends to permanently berth its vessel, it should be required to unequivocally do so and not be allowed to affect the lives of so many litigants by the mere use of a self-serving declaration furthering the affiant's self-interest.

State legislatures were never meant to have the authority to supercede federal maritime law especially when jurisprudence evolves to a point where those with the most to gain can deprive injured claimants the benefits derived from seaman status by the mere use of self-serving declarations. This could not possibly be the desired outcome of the use of the state legislative process. By allowing this to happen, courts have now allowed the tail to wag the dog.

Petitioner suggests that a casino boat permanently removed from navigation is similar to that class of vessels known as "Dead Ships. " Dead ships or dead vessels represent a subcategory of non-vessels as they are indisputably vessels for most of their useful life, but thereafter they assume the status of non-vessels. *See Colonna's Shipyard, Inc. v. U.S.A.F. GENERAL HOYT S. VANDENBERG*, 584 F. Supp. 2d 862, 867 (E.D. Va. 2008). A key element in determiñing whether a watercraft that was indisputably a vessel at some point in the past is now a "dead ship is whether such watercraft is permanently withdrawn from navigation. *See Colonna's Shipyard, Inc. v. U.S.A.F. GENERAL HOYT S. VANDENBERG*, 584 F. Supp. 2d 862, 867 (E.D. Va. 2008).

Vessel owners can take actions which can be used as objective facts in establishing that a vessel is merely

"theoretically capable" of maritime transportation. For example see the following Federal court decisions and their handling of similar issues:

1. *McAdow v. Promus Companies, Inc.*, 926 F.Supp. 93, 95 (W.D. Louisiana 1996) (concrete barriers separated casino boat from the Red River, requiring a crane barge to lift the gate of the coffer cell before the vessel could be freed from its retaining walls.).

2. *Dunklin v. Louisiana Riverboat Gaming Partnership*, 2001 WL 650209, *2 (5th Cir. La.) (casino vessel sitting in an enclosed pond in a cofferdam was deemed clearly withdrawn from navigation because of the "massive amounts of time and money" required to allow the vessel to leave the cofferdam.).

3. *Silver Slipper Casino Venture LLC v. Does*, 264 Fed. Appx. 363, 364-65 (5th Cir. 2008) (casino boat was moored in a marina that was almost completely surrounded by land mass with the exception of an opening providing ingress and egress to yachts moored in the marina. The vessel was not exposed to the perils of the sea or the hazards of navigation.).

4. *In re Complaint of American Milling Co.*, Unlimited 2008 WL 2727257, *6 (E.D.Mo.) (casino boat was stripped of engines to power motion and steering, possessed no life jackets or marine equipment to communicate with the Coast Guard, and its entire physical construction had been modified).

5. *Wire v. Showboat Marina Casino*, 2008 WL 818310, *5,6 (N.D. Ill. 2008)(vessel had been modified and could not sail in its modified condition.).

Further, the Coast Guard Marine Safety Manual outlines specific criteria that must be met before a vessel is considered to have been taken out of transportation and permanently moored. Most importantly, the vessel must be immobilized so that it cannot be moved except on a deliberate basis where extensive effort and equipment would be required. Therefore, Petitioner avers that owners of casino boats can take steps to demonstrate permanently moored status such as enclosing the vessel in a cofferdam or artificial channel; removing or disabling the vessel's engines; physically modifying the vessel's structure; and releasing the vessel's captain and marine crew.

Petitioner suggests that owner's of "indefinitely moored" or "semi-permanently moored" casino boats are strictly concerned with profits and do not wish to expend the funds necessary to permanently remove the vessel from navigation. Casino owners are also aware that public sentiment could change in the future. With the exception of Mississippi, all states that allowed casino boat gaming initially required that the vessel sail regularly. One-by-one, the legislatures changed the laws to allow "dockside" gaming. A change in public sentiment could once again result in a requirement that the casino boats actually sail. In sum, many owners of casino vessels cannot or will not take the steps necessary to permanently moor their vessels, and yet, they want protection from liability in Jones Act or General

Maritime law matters when their employees are injured in service of their vessels.

Petitioner avers, as has been pointed out by many courts in this land, that vessel status turns not on the intent of the owner, but rather, on objective facts establishing that the ship is "practically capable" of maritime transportation. As noted by the court in *Sea Village Marina*, "It would seem a rather odd definition of 'capable' that would allow it to apply or not apply depending on mere plans and expectations, which are always subject to change." *Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat*, Hull ID No. LMG37164M80d, 2009 WL 3379923, *8 (D.N.J.), 2010 A.M.C. 404.

As explained by the Eleventh Circuit in *Belle of Orleans*, vessel status cannot turn on a shipowner's subjective intentions as such a test is "incompatible with the Supreme Court's focus on providing uniformity within admiralty jurisdiction." *Board of Com'rs of Orleans Levee Dist. v. M/V BELLE OF ORLEANS*, 535 F.3d 1299, 1311 (11th Cir. 2008). *See also Colonna's Shipyard, Inc. v. U.S.A.F. GENERAL HOYT S. VANDENBERG*, 584 F. Supp. 2d 862, 871 (E.D. Va. 2008) ("A standard devoid of the need to ascertain intent is more likely to lead to predictable and settled commercial expectations because it relies on objective criteria."); *Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat*, Hull ID No. LMG37164M80d, 2009 WL 3379923, *8 (D.N.J.), 2010 A.M.C. 404 (Holding the intent of the owners irrelevant and focusing on objective characteristics is useful for the purpose of uniformity).

The question is ultimately whether the beliefs and expectations of the parties can alter the "practical possibility" of the craft's "use as a means of transportation on water." *Sea Village Marina, LLC v. A 1980 Carlcraft Houseboat*, Hull ID No. LMG37164M80d, 2009 WL 3379923, *8 (D.N.J.), 2010 A.M.C. 404 *citing Stewart*, 543 U.S. at 496.

Post accident affidavits which assert subjective "intentions" have no place in the law when it adversely affects the rights of hundreds, if not thousands, of claimants. Self serving affidavits made by parties furthering their self interests are hardly reliable. An owner's intentions may change in ways never anticipated. *Board of Com'rs of Orleans Levee Dist. v. M/V BELLE OF ORLEANS*, 535 F.3d 1299, 1312 (11th Cir. 2008).

If a casino owner/shipowner truly intends to permanently berth its vessel it should be required to unequivocally do so and not be allowed to affect the lives of so many litigants by the mere use of a self-serving declaration furthering the affiant's self-interest. By allowing a vessel to be considered indefinitely moored by a subjective affidavit, the courts are allowing fully navigational vessels to sail in and out of Jones Act coverage and are making maritime law malleable or even changing it and making it not uniform, practices which this Court has repeatedly stated it will not condone.

The issue of owner intent has also been addressed in recent law review articles. For example, see the following:

1. David W. Robertson, *How the Supreme Court's New Definition of "Vessel" is Affecting Seaman Status, Admiralty Jurisdiction, and Other Areas of Maritime Law*, 39 J. Mar. L. & Com. 115, 133, 134 (2008): At one end of the spectrum are cases in which the only argument against vessel status is the casino boat operator's announced intention to sail no more. A number of the pre-Stewart cases using the "in navigation" requirement to deny seaman status to workers on casino boats fell into this category. The big post-Stewart question is whether a casino boat operator's completely believable intention to remain at the dock as long as the gambling is good can justify characterizing the boat as "permanently moored or otherwise rendered practically incapable of transportation or movement." On its face, such a characterization seems strained: The boat's capability for marine transportation remains as practical as it was the day before the legislature changed the law.

2. Stephen W. Grant, Jr., *Calling All Bets On Gaming Boat Vessel Status: An Analysis Of How The Fifth Circuit Is Consistent With Stewart v. Dutra Construction Co.*, 34 Tul. Mar. L.J. 331, 352 (2009): Owner intent does not have to be a purely subjective factor because the surrounding facts and circumstances will often clearly indicate the intent of the owners. An

owner who alleges no maritime transportation function would hardly seem credible if the boat had recently cruised or if the crew rigorously maintains operable engines and navigational aids.

3. Ross I. Landau, *A Theoretical Possibility Of Navigation: An Analysis Of The Vessel Status Of Watercraft-Casinos In The Wake Of Stewart V. Dutra Construction Co.*, 32 Tul. Mar. L.J. 249, 274 (2007): The objective manifestations of an owner's intent, particularly whether the watercraft in question remained registered with the Coast Guard as a passenger vessel or had been reclassified as a "permanently moored vessel," can serve as reliable indicia of the owner's intent. In addition, maintenance of a working engine, steering controls, and navigational equipment, as well as the employment of a trained captain and crew, objectively evince an intent to use, or at least to be prepared to use, a watercraft in maritime transportation.

Petitioner avers that there is a need for this Court to specifically address the issue of whether or not casino boats that once sailed regularly but no longer do so pursuant to changes in state gaming laws are vessels in navigation for purposes of the Jones Act and general maritime law.

The *Stewart* court seemingly indicated that a vessel "permanently" taken out of the water is not a vessel in navigation, but then immediately cited *Pavone*, a case

where a floating casino, which had never been intended to be used as a vessel, was not a vessel because it had been "semi-permanently" or "indefinitely" removed from navigation. Petitioner asserts that clarification of the citation to *Pavone* is necessary to reduce the confusion found in Federal Circuit and state courts. Petitioner respectfully asks this Court to clearly state that a determination of whether a casino boat is either practically or theoretically capable of sailing should be made solely on the basis of whether or not the vessel has been permanently removed from navigation.

Petitioner suggests that the subcategory of non-vessels known as "dead ships" be expanded to include casino boats permanently removed from navigation. Dead ships or dead vessels are indisputably vessels for most of their useful life, but thereafter they assume the status of non-vessels when they are permanently withdrawn from navigation. By demonstrating that their vessels have been permanently removed from navigation, casino boat owners can rightfully maintain that there is only a theoretical possibility of their vessels sailing in the future.

As for the determination of whether or not a casino boat has been permanently withdrawn from navigation, this Court must set forth a standard that requires more than just a self-serving affidavit from a casino boat owner that they do not intend for the vessel to sail again. Owner intent does not have to be a purely subjective factor. The surrounding facts and circumstances will often clearly indicate the intent of the vessel owner. If, as some courts have found, a casino boat owner's intentions are relevant to the determination of permanently moored status, this Court must require objective manifestations of the owner's intent.

3. Is status as a worker caused by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) required to assert a Sieracki seaman claim for general maritime law damages?

On remand, the trial court dismissed Petitioner's claim against Caesars based on her alleged status as a Sieracki seaman. Petitioner appealed the decision. Declining to reconsider its prior opinion and finding no error in the dismissal of her Sieracki claim, the Court of Appeals affirmed. *See Conder v. RDI/Caesars Riverboat Casino, Inc.*, 918 N.E.2d 759 (Ind. App. 2009). On April 15, 2010, the Indiana Supreme Court denied Petitioner's motion to transfer jurisdiction. The Indiana Court of Appeals wrongly held that status as a longshoreman is a prerequisite for asserting a Sieracki claim. *See Conder v. RDI/Caesars Riverboat Casino, Inc.*, 918 N.E.2d 759,763 (Ind. App. 2009). In fact, the 1972 amendments to the Longshore and Harbor Workers' Act, actually preclude persons covered under the Act from making a Sieracki claim.

To accomplish that goal, Congress enacted 33 U.S.C. § 905(b),providing a person covered by the act with a negligence action against the vessel, expressly abrogating the "warranty" of seaworthiness. *See Aparicio v. Swan Lake*, 643 F.2d 1109, 1115 (5th Cir. 1981). Literally read, Section 905(b), which Congress enacted to abolish the Sieracki remedy, does not apply to maritime workers who are not within the coverage of the LHWCA. The statute manifests no intention to expand the abolition of the Sieracki-Ryan construct beyond the coverage of the LHWCA. *Aparicio v. Swan Lake*, 643 F.2d 1109, 1116 (5th Cir. 1981). *See also Pena*

v. Keystone Shipping Co., 142 F. Supp. 2d 801, 804-805 (S.D. Tex. 2001); *Blancq v. Hapag-Lloyd A.G.*, 986 F. Supp. 2d 376, 382 (E.D. La. 1997); *Eagle-Picher Industries, Inc. v. U.S.*, 937 F.2d 625, 632 (C.A.D.C. 1991).

In *Aparicio v. Swan Lake*, the Fifth Circuit refused to read into the 1972 amendments the abolition of judicially-built remedies as they apply to maritime workers not covered by the LHWCA, including those amphibious workers who may be covered only by a state compensation law or who may have no compensation law coverage at all. *See Aparicio v. Swan Lake*, 643 F.2d 1109, 1116 (5th Cir. 1981). *See also In re TPT Transp.*, 191 F. Supp. 2d 717, 720-721 (M.D. La. 2001) ("... section 905(a) does not abolish the Sieracki and Ryan remedies for certain workers who are not covered under the LHWCA."). In Aparicio, the Fifth Circuit reasoned that had Congress intended to affect the substantive rights of persons not covered by the LHWCA, it could readily have manifested that intention. *See Aparicio v. Swan Lake*, 643 F.2d 1109, 1116 (5th Cir. 1981).

Petitioner does not meet the status requirement and is not covered under the LHWCA. Assume for the sake of argument that Petitioner is not a Jones Act seaman. Therefore Petitioner, an employee injured at work on the M/V GLORY ROME, would not be covered by either the LHWCA or the Jones Act, but rather by state compensation law. The 1972 amendments to the Longshore Act did not abolish the Sieracki doctrine for a worker in such a position. *See Wilson v. Butler*, 2009 WL 111685, *4 (M.D. Fla.) ("For those workers who fall into the crack between seamen and longshore workers,

the Sieracki doctrine and the warranty of seaworthiness still rule the sea"); *Radut v. State St. Bank & Trust Co.*, 2004 WL 2480467, *3, n.36 (S.D.N.Y. 2004); *Cavin v. State, Fish and Wildlife Protection Div.*, 3 P.3d 323, 330 (Alaska 2000); *Blancq v. Hapag-Lloyd A.G.*, 986 F. Supp. 2d 376, 382 (E.D. La. 1997).

The Indiana Court of Appeals held that a Sieracki seaman claim requires the involvement of a navigating "vessel" and reiterated its previous holding that an indefinitely moored dockside casino with no transportation function or purpose does not qualify as a vessel in navigation. *See Conder v. RDI/Caesars Riverboat Casino, Inc.*, 918 N.E.2d 759,763 (Ind. App. 2009) *citing* 896 N.E.2d at 1179 (Emphasis added). However, the prior finding that the river boat was not a vessel because it had no transportation function or purpose is itself erroneous and works an injustice on Petitioner and all other casino boat workers in a similar position. The Indiana Court of Appeals' utilization of the "primary purpose" test is not consistent with *Stewart*. The *Stewart* court relied on 1 U.S.C. § 3 for the definition of a "vessel." *See Stewart*, 543 U.S. at 492, 125 S. Ct. at 1126. Section 3 requires only that a watercraft be "used, or capable of being used, as a means of transportation on water" to qualify as a vessel. It does not require that a watercraft be used primarily for that purpose. *Stewart*, 543 U.S. at 495, 125 S. Ct. at 1128. Clearly the Glory of Rome is a vessel pursuant to *Stewart*. There is a more than a practical possibility that the watercraft could be used as a means of transportation over water.

Petitioner has made an unseaworthiness claim as a Sieracki seaman against the vessel owners. This is

distinct from her Jones Act claim. An unseaworthiness claim under maritime common law is separate from a Jones Act negligence claim. *Vandekreeke v. USS Great Lakes Fleet, Inc.*,172 F. Supp. 2d 907, 911 (E.D. Mich. 2001). *See also Freeze v. Lost Isle Partners*, 116 Cal. Rptr. 2d 520, 523; 2002 A.M.C. 842 (Cal. App. 1 Dist. 2002) (Plaintiff's right to seek alternative relief for her damages under general maritime law was separate from the issue of whether she was a "seaman" under the Jones Act.).

Petitioner is a member of that particular class of maritime workers who "fall into the crack" between Jones Act seamen and longshore workers. If Petitioner is not covered under either the Jones Act or the Longshore Act, she is not precluded from making a claim, as a Sieracki seaman, for unseaworthiness against the vessel owner. Therefore, the Indiana Court of Appeal, as affirmed by the Indiana Supreme Court, incorrectly dismissed Petitioner's case.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE COURT OF APPEALS OF INDIANA DATED AND FILED DECEMBER 31, 2009

IN THE COURT OF APPEALS OF INDIANA

No. 31A01-0907-CV-348

TINA CONDER,

Appellant-Plaintiff,

vs.

RDI/CAESARS RIVERBOAT CASINO, INC., and M/V GLORY OF ROME,

Appellees-Defendants.

APPEAL FROM THE HARRISON CIRCUIT COURT
The Honorable H. Lloyd Whitis, Judge
31C01-0504-PL-18

December 31, 2009

OPINION – FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff Tina Conder appeals the trial court's dismissal of her complaint against appellants-defendants RDI/Caesars Riverboat Casino, Inc., and M/V Glory of Rome (collectively, Caesars). Conder

argues that we should reconsider our opinion in the prior appeal in this matter and that the trial court erroneously dismissed her claim against Caesars based on her alleged status as a Sieracki seaman. Declining to reconsider our prior opinion and finding no error in the dismissal of her Sieracki claim, we affirm.

FACTS

The underlying facts have already been described by this court in the first appeal in this litigation:

> Caesars operates a casino (the Casino) on the riverboat M/V Glory of Rome (the Riverboat). The Riverboat is a passenger vessel that is registered with and regularly inspected by the U.S. Coast Guard. It has its own engines and machinery, as well as navigation, lifesaving, and fire-fighting equipment.
>
> In August 2002, the Casino began exclusively conducting dockside gambling pursuant to amendments to Indiana state law that allowed casinos to stop cruising and conduct gaming while dockside. Since that time, the Riverboat has been moored and stationary with the exception of rare tests conducted in compliance with federal regulations. It is connected to the dock by eight mooring lines, two double-up lines, three fuel hoses, a sewage and waterhose, and seven

power cables. Since August 2002, the Riverboat has not transported passengers, cargo, or equipment.

Beginning in March 2002, Conder was employed as a table games dealer in the Casino. On August 19, 2003, and on subsequent occasions, Conder was repeatedly bitten by fleas during the course of her employment at the Casino. Treatment for her adverse reaction to the flea bites included large doses of steroids, which allegedly caused her to have a heart attack.

On April 26, 2005, Conder filed a complaint against Caesars, seeking compensation for her injuries based on the Jones Act[1] or, in the alternative, pursuant to Indiana worker's compensation laws as a seaman *pro hac vice*—a Sieracki seaman. On March 26, 2007, Caesars filed a motion to dismiss the complaint pursuant to Indiana Trial Rule 12(B)(1). On May 15, 2007, Conder filed a motion for partial summary judgment, seeking a declaration as a matter of law that she is a Jones Act Seaman. The trial court held a hearing on the motion to dismiss and the motion for partial summary judgment on October 10, 2007, and on December 4, 2007,

1. 46 U.S.C. § 688.

> the trial court summarily denied Caesars's motion and granted Conder's motion.

RDI/Caesars Riverboat Casino, Inc. v. Conder, 896 N.E.2d 1172, 1173-74 (Ind. Ct. App. 2008) (*Caesars I*) (internal footnote omitted). In *Caesars I*, the primary issue was "whether the Riverboat is a 'vessel in navigation' under the Jones Act." *Id.* at 1175. After a lengthy examination of relevant precedent, this court reached the following conclusions:

> like the majority of cases in which a riverboat casino was found not to be a vessel in navigation, the Riverboat was theoretically capable of being in navigation but was intended to be removed from navigation and was practically unable to navigate except in emergency situations.... It is undisputed that since 2002, the Riverboat's operations have been entirely gaming-related, and not maritime in nature. In other words, the Riverboat is an indefinitely moored dockside casino with no transportation function or purpose. We agree with the Seventh Circuit that "indefinitely moored dockside casinos are not the kind of vessel that the Jones Act addresses[, given] . . . the statute's purpose of enhancing legal protections for seamen 'regularly exposed to the 'perils of the sea.'" *Howard* [*v. S. Ill. Riverboat Casino Cruises, Inc.*], 364 F.3d [854, 857 (7th Cir. 2004)] (citing *Chandris*[*v. Latsis*], 515 U.S. 347, 369 (1995)].

In sum, the Riverboat has been moored to the dock since 2002. It has had no transportation function since that time. It is joined to the land by a number of cables. It is connected to land-based utilities. Its owners intend that it remain stationary for the foreseeable future. Thus, the Riverboat's operations are gaming-related, rather than maritime in nature, and that has been the case since 2002. Conder, as a table games dealer for the Casino, is simply not an employee who is regularly—or at all—exposed to "the special hazards and disadvantages to which they who go down to sea in ships are subjected." *McDermott[Int'l, Inc. v. Wilander]*, 498 U.S. [337, 354 (1991)] Under these circumstances, we cannot conclude that the Riverboat is a vessel in navigation or that Conder is the type of employee that the Jones Act is intended to cover and protect. We find, therefore, that the trial court erred as a matter of law by granting Conder's motion for partial summary judgment and denying Caesars's motion to dismiss the Jones Act count of Conder's complaint. [FN]

> FN. Conder included a second, alternative, count in her complaint, seeking relief as a seaman pro hac vice—a Sieracki seaman. We infer from the pleadings in the appendices that the Casino included this count

> in its motion to dismiss. The Casino, however, has not appealed the trial court's order denying its motion to dismiss with regard to the Sieracki seaman count. Indeed, neither party addresses this issue on appeal. Consequently, we remand for further proceedings on this claim.

Id. at 1179 (some internal citations omitted). Conder did not seek rehearing on this opinion and filed an untimely request for transfer to our Supreme Court, which dismissed the transfer request and declined to consider it.

On March 25, 2009, Caesars filed a motion to dismiss Conder's complaint, including her claims seeking relief under the Jones Act and as a Sieracki seaman. On April 3, 2009, the trial court granted the motion with respect to the Jones Act claims, and on June 1, 2009, the trial court summarily dismissed Conder's remaining claims, including the Sieracki seaman claim. Conder now appeals.

DISCUSSION AND DECISION

I. Jones Act

Conder's primary argument on appeal is that *Caesars I* was incorrectly decided. In support of this position, she makes precisely the same arguments she made in the first appeal of this matter. We decline to

revisit the holding of *Caesars I*. Additionally, contemporaneously with this opinion, we are entering an order granting Caesars's motion to strike this issue from Conder's briefs and granting Conder's motion to strike the portion of Caesars's appendix including the briefs and appendix filed in *Caesars I*.

II. Sieracki Seaman Claims

Conder also argues that the trial court improperly dismissed her claims seeking relief as a Sieracki seaman. In reviewing a dismissal under Indiana Trial Rule 12(B)(6), we must determine whether, in the light most favorable to the plaintiff and with every inference drawn in her favor, the complaint states any set of allegations upon which the trial court could have granted relief. *Thomson Consumer Elecs., Inc. v. Wabash Valley Refuse Removal, Inc.*, 682 N.E.2d 792, 793 (Ind. 1997).

The Sieracki seaman doctrine arises from *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The *Sieracki* Court held that a longshoreman, who was injured by a dangerous, defective condition while aboard a vessel, could recover from the vessel's owner under a theory that the owner had breached its warranty of seaworthiness of the ship. *Id.* at 99-102; *see also* Black's Law Dictionary 954 (7th ed. 1999) (defining "longshoreman" as "[a] maritime laborer, such as a stevedore, who works on the wharves in a port; a person who loads and unloads ships").

The parties disagree about whether the Sieracki doctrine has survived the 1972 amendment of the Longshore and Harbor Workers' Compensation Act. 33 U.S.C. §§ 901-950. We need not answer that question, however, inasmuch as Conder is not entitled to relief as a Sieracki seaman in any event. A prerequisite to asserting such a claim is status as a longshoreman, and to qualify as such, one must be engaged in "maritime employment." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423-24 (1985) (stating that "maritime employment" includes "those workers on the situs who are involved in the essential elements of loading and unloading"); *see also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 267 (1977) (holding that it is "clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered"). Here, Conder was a card dealer in a casino that this court has already concluded was not maritime in nature; therefore, she was not engaged in maritime employment. Thus, Conder does not qualify as a Sieracki seaman.

Furthermore, a Sieracki seaman claim requires the involvement of a navigating "vessel." *See generally Sieracki*, 328 U.S. 85 (decision resting, in part, on the unseaworthiness of the longshoreman's vessel). Here, we have already found in *Caesars I* that an indefinitely moored dockside casino with no transportation function or purpose does not qualify as a vessel in navigation. 896 N.E.2d at 1179. We further found that "the Riverboat's operations are gaming-related, rather than maritime in nature, and that has been the case since

2002." *Id.* at 1181. Under these circumstances, we find, likewise, that the Riverboat does not qualify as a "vessel" for the purpose of a Sieracki claim. Therefore, under no circumstances is Conder entitled to relief on this basis, and the trial court did not err by dismissing this claim.

The judgment of the trial court is affirmed.

BAILEY, J., and ROBB, J., concur.

APPENDIX B — ORDER OF DISMISSAL OF THE HARRISON CIRCUIT COURT, STATE OF INDIANA, COUNTY OF HARRISON FILED JUNE 1, 2009

IN THE HARRISON CIRCUIT COURT

STATE OF INDIANA)
:SS
COUNTY OF HARRISON)

CAUSE NO. 31C01-0504-PL-18

TINA CONDER,

PLAINTIFF,

V.

RDI/CAESARS RIVERBOAT CASINO, LLC AND M/V GLORY OF ROME,

DEFENDANTS.

ORDER OF DISMISSAL

The Defendants, RDI/Caesars Riverboat Casino, LLC and M/V Glory of Rome, by counsel and pursuant to T.R. 12 (B) 1 and 12 (B) 6, having moved the Court to dismiss Plaintiff, Tina Conder's claim that she is a "Sieracki seaman", and the Court being sufficiently advised as to the merits of said Motion;

Appendix B

IT IS HEREBY ORDERED that the Court now finds that Plaintiff is not entitled to treatment as a Sieracki seaman under the Jones Act, and that there is no subject matter jurisdiction for a claim against the M/V *Glory of Rome* in this Court. Both claims are therefore dismissed. Because these are the sole remaining claims asserted by the Plaintiff, her Complaint is hereby DISMISSED with PREJUDICE. This is a final unappealable Order.

SO ORDERED this 1st day of June, 2009.

s/ [illegible]
Judge, Harrison Circuit Court

APPENDIX C — ENTRY OF JUDGMENT AND PARTIAL DISMISSAL OF THE HARRISON CIRCUIT COURT, STATE OF INDIANA, COUNTY OF HARRISON DATED AND FILED APRIL 3, 2009

IN THE HARRISON CIRCUIT COURT

STATE OF INDIANA
COUNTY OF HARRISON

CAUSE NO. 31C01-0504-PL-18

TINA CONDER,

PLAINTIFF,

V

RDI/CAESARS RIVERBOAT CASINO, LLC AND M/V GLORY OF ROME,

DEFENDANTS.

ENTRY OF JUDGMENT AND PARTIAL DISMISSAL

The Court, having considered the opinion of the Indiana Court of Appeals issued in RDI/Caesars Riverboat Casino, LLC and M/V Glory of Rome v. Tina Conder, 31A04-0802-CV-40, November 25, 2008, 896 NE 2d 1172, 2008 A.M.C. 2861, hereby ORDERS that all Plaintiff's claims asserted under the Jones Act against the Defendants are hereby DISMISSED with prejudice.

Appendix C

The Court will further consider the Defendants' Second Motion to Dismiss the claims remaining in this matter, along with any responsive memoranda filed by the Plaintiff.

SO ORDERED this 3rd day of April, 2009.

s/ [illegible]
Judge, Harrison Circuit Court

APPENDIX D — OPINION OF THE COURT OF APPEALS OF INDIANA DATED AND FILED NOVEMBER 25, 2008

IN THE COURT OF APPEALS OF INDIANA

No. 31A04-0802-CV-40

RDI/CAESARS RIVERBOAT CASINO, INC., and M/V GLORY OF ROME,

Appellants-Defendants,

vs.

TINA CONDER,

Appellee-Plaintiff.

APPEAL FROM THE HARRISON CIRCUIT COURT
The Honorable H. Lloyd Whitis, Judge
31C01-0504-PL-18

November 25, 2008

OPINION –FOR PUBLICATION

BAKER, Chief Judge

Here, we must decide whether a riverboat casino that is indefinitely moored to the shore is a "vessel in

navigation" for the purpose of the federal Jones Act.[1] We hold that it is not. Appellants-defendants RDI/Caesars Riverboat Casino, Inc., and the M/V Glory of Rome (collectively, Caesars) appeal the trial court's order granting appellee-plaintiff Tina Conder's motion for partial summary judgment and denying Caesars's motion to dismiss Conder's complaint. Caesars argues that the trial court erred as a matter of law by concluding that an indefinitely moored, dockside casino was a "vessel in navigation" pursuant to the Jones Act and that Conder was a Jones Act Seaman. Finding that the Jones Act does not apply, we reverse in part and remand with instructions to dismiss Conder's Jones Act claim and for further proceedings on her Sieracki seaman claim.

FACTS

Caesars operates a casino (the Casino) on the riverboat M/V Glory of Rome (the Riverboat). The Riverboat is a passenger vessel that is registered with and regularly inspected by the U.S. Coast Guard. It has its own engines and machinery, as well as navigation, lifesaving, and fire-fighting equipment.

In August 2002, the Casino began exclusively conducting dockside gambling pursuant to amendments to Indiana state law that allowed casinos to stop cruising and conduct gaming while dockside. Since that time, the Riverboat has been moored and stationary with the

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1. 46 U.S.C. § 688.

exception of rare tests conducted in compliance with federal regulations. It is connected to the dock by eight mooring lines, two double-up lines, three fuel hoses, a sewage and water hose, and seven power cables. Since August 2002, the Riverboat has not transported passengers, cargo, or equipment.

Beginning in March 2002, Conder was employed as a table games dealer in the Casino. On August 19, 2003, and on subsequent occasions, Conder was repeatedly bitten by fleas during the course of her employment at the Casino. Treatment for her adverse reaction to the flea bites included large doses of steroids, which allegedly caused her to have a heart attack.

On April 26, 2005, Conder filed a complaint against Caesars, seeking compensation for her injuries based on the Jones Act or, in the alternative, pursuant to Indiana worker's compensation laws as a seaman pro hac vice—a Sieracki seaman. On March 26, 2007, Caesars filed a motion to dismiss the complaint pursuant to Indiana Trial Rule 12(B)(1).[2] On May 15, 2007, Conder filed a motion for partial summary judgment, seeking a declaration as a matter of law that she is a Jones Act Seaman. The trial court held a hearing on the motion to dismiss and the motion for partial summary judgment on October 10, 2007, and on December 4, 2007, the trial court summarily denied Caesars's motion and granted Conder's motion. Caesars now appeals.

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2. The motion to dismiss is not included in the record on appeal.

Appendix D

DISCUSSION AND DECISION

I. Standard of Review

A. Summary Judgment

In considering whether the trial court properly granted partial summary judgment in Conder's favor, we observe that summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Owens Corning Fiberglass Corp. v. Cobb*, 754 N.E.2d 905, 909 (Ind. 2001); *see also* Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. *Owens Corning*, 754 N.E.2d at 909. Additionally, all facts and reasonable inferences from those facts are construed in favor of the nonmoving party. *Id.* If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. *Id.*

An appellate court faces the same issues that were before the trial court and follows the same process. *Id.* at 908. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. *Id.* When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. *Id.*

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B. Motion to Dismiss

In considering whether the trial court properly denied Caesars's motion to dismiss the complaint pursuant to Trial Rule 12(B)(1), we note that our review depends upon what occurred in the trial court. *GKN Co. v. Magness*, 744 N.E.2d 397, 401 (Ind. 2001). Here, the trial court did not conduct an evidentiary hearing; instead, it relied on a "paper record." *Id.* Thus, we apply a de novo standard of review to the trial court's order. *Id.*

II. The Jones Act

The law has long recognized seamen as a special group of workers who are entitled to certain protections not afforded to their land-based counterparts:

> traditional seamen's remedies . . . have been universally recognized as . . . growing out of the status of the seaman and his peculiar relationship to the vessel, and as a feature of the maritime law compensating or offsetting the special hazards and disadvantages to which they who go down to sea in ships are subjected.

McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 354, 111 S. Ct. 807, 112 L. Ed. 2d 866 (1991). Among other benefits, workers who qualify as Jones Act Seamen may sue their employer directly in a civil action for negligence. 46 U.S.C. § 688. They may also sue their

employer for a vessel's unseaworthiness. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 542, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960).

The United States Supreme Court has established a two-prong test for determining whether an employee is a Jones Act Seaman. *Chandris v. Latsis*, 515 U.S. 347, 368, 115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995). First, the employee must establish that she has a substantial employment-related connection to a "vessel in navigation[.]" *Id.* Second, the employee must establish that her duties contributed to the function of the vessel or the accomplishment of its mission. *Id.* The Court explained that the "Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.'" *Id.* at 370 (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104, 66 S. Ct. 872, 90 L. Ed. 1099 (1946) (Stone, C.J., dissenting)).

The primary issue in this appeal is whether the Riverboat is a "vessel in navigation" under the Jones Act. The United States Supreme Court's most recent exploration of the issue occurred in *Stewart v. Dutra Construction Company*, 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005). The *Stewart* Court considered whether a floating dredge called the Super Scoop was a "vessel in navigation," describing its relevant characteristics as follows:

> The Super Scoop is a massive floating platform . . . [and] has certain characteristics common

> to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and a crew dining area. But it lacks others. Most conspicuously, the Super Scoop has only limited means of self-propulsion. It is moved long distances by tugboat. . . . It navigates short distances by manipulating its anchors and cables. When dredging the Boston Harbor trench, it typically moved in this way once every couple of hours, covering a distance of 30-to-50 feet each time.

Id. at 484-85. The Court concluded that the term "vessel" "'includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water.'" *Id.* at 489 (quoting 1 U.S.C. § 3). And, more specifically, "a watercraft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." *Id.* at 494 (citing *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 271 U.S. 19, 46 S. Ct. 379, 70 L. Ed. 805 (1925) (finding that a wharfboat that was attached to the mainland by water, electricity, and telephone cables and was neither taken from place to place nor used to carry freight from one place to another was not a vessel in navigation)). The *Stewart* Court cautioned that a ship's status as a vessel--or as a non-vessel--is not something that changes frequently:

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> A ship and its crew do not move in and out of Jones Act coverage depending on whether the ship is at anchor, docked for loading or unloading, or berthed for minor repairs, in the same way that ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again. See *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F3d 560, 570 (C.A.5 1995) (floating casino was no longer a vessel where it "was moored to the shore in a semi-permanent or indefinite manner") . . . .

Id. at 494. Structures, however, "may lose their character as vessels if they have been withdrawn from the water for extended periods of time." *Id.* at 495.

Turning back to the Super Scoop, the Court noted that the relevant statute "requires only that a watercraft be 'used or capable of being used, as a means of transportation on water' to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose." *Id.* (emphasis in original). The Super Scoop "was not only 'capable of being used' to transport equipment and workers over water—it *was* used to transport those things." *Id.* (emphasis in original). In sum,

> the "in navigation" requirement is an element of the vessel status of a watercraft. It is relevant to whether the craft is "used, or

> capable of being used" for maritime transportation. A ship long lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. The question remains in all cases whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one. . . . [T]he Super Scoop had not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport.

Id. at 496. Therefore, the Court concluded that the dredge was a "vessel in navigation" pursuant to the relevant statutory definition. *Id.* at 497.

The Seventh Circuit Court of Appeals has explored this issue on at least two occasions. In *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, the court considered whether an employee of an indefinitely moored riverboat casino was a Jones Act Seaman. 364 F.3d 854 (7th Cir. 2004).[3] The riverboat in *Howard* ceased cruising along the Ohio River following a change in Illinois state law in 1999 and was permanently moored to the dock thereafter. *Id.* at 855. The casino did not

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3. *Howard* was decided before *Stewart*. Although portions of the *Howard* analysis may now be in question in light of *Stewart*, much of the opinion is consistent with *Stewart* and there has been no suggestion that it has been overruled.

transport passengers and was connected to land-based utilities, though it could be disconnected from the dock in fifteen to twenty minutes if needed. The riverboat was classified as a passenger vessel by the United States Coast Guard and employed a captain and crew qualified to move the casino if needed.

The Seventh Circuit focused on the same precedent as the United States Supreme Court later examined in *Stewart*, noting that past cases "did not hinge upon whether the vessel was ready and able to cruise, but looked to the vessel's purpose and actual use (whether it was used to move or transport anything)." *Id.* at 857 (citing *Pavone v. Mississippi Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995)). The *Howard* court ultimately concluded that "an indefinitely moored dockside casino with no transportation function or purpose" is not a vessel in navigation because "[r]ecognizing that indefinitely moored dockside casinos are not the kind of vessels that the Jones Act addresses is consistent with the statute's purpose of enhancing legal protections for seamen 'regularly' exposed to the 'perils of the sea.'" *Id.* at 857 (citing *Chandris*, 515 U.S. at 369).

In 2006, the Seventh Circuit decided *Tagliere v. Harrah's Illinois Corporation*, which considered whether admiralty jurisdiction had been properly asserted over a lawsuit brought by a patron against a riverboat casino operator. 445 F.3d 1012 (7th Cir. 2006). Although the central issue in *Tagliere* is distinct from the primary question at issue herein, some of the analysis is relevant to this appeal. In considering

whether the riverboat casino was a "vessel" for the purpose of admiralty jurisdiction, the *Tagliere* court applied the *Stewart* rationale:

> while the Supreme Court has now held that a boat that "has been permanently moored or otherwise rendered practically incapable of transportation or movement" is not a "vessel" for purposes of admiralty jurisdiction, *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 494, 125 S.Ct. 1118, 160 L.Ed.2d 932 (2005), there has been no showing that the boat in our case, though stationary for the past two years, is *permanently* moored in the Court's sense (disabled from sailing) and is thus the equivalent of landfill.

Id. at 1013-14 (emphasis in original). Ultimately, the court held that the district court had erred in dismissing the suit for lack of jurisdiction,

> though it is open to the defendant to show on remand, if it can, that its boat was permanently rather than merely indefinitely moored when the accident occurred and was therefore no longer a "vessel" for purposes of admiralty jurisdiction. The difference between "permanently" and "indefinitely" in this context is vague and has not been explored by the parties. The *Stewart* case suggests that the boat must be permanently incapacitated from sailing. *Yet maybe—by*

> *analogy to the difference between domicile and residence—a boat also is "permanently" moored when its owner intends that the boat will never again sail, while if he has not yet decided its ultimate destiny it is only "indefinitely" moored.* These are matters for exploration on remand.

Id. at 1016 (emphasis added). Thus, although the Seventh Circuit did not provide a final answer to the question of how to determine the status of a moored riverboat casino, it suggested that the intent of the owner is a relevant factor to consider.

The United States District Courts of Indiana and Illinois have also had occasion to consider whether indefinitely moored riverboat casinos are vessels in navigation pursuant to the Jones Act. Without exception, these courts have concluded that the Jones Act does not apply. In *Earls v. Belterra Resort, Indiana, LLC*, an employee of a riverboat casino sued her employer under the Jones Act for injuries she sustained on the job. 439 F. Supp. 2d 884 (S.D. Ind. 2006). The riverboat was indefinitely moored in 2002 following an amendment to Indiana state law. It was certified by the Coast Guard as a passenger vessel, had a full-time crew, steering controls, and navigational lights, and could be unmoored and cruising on the Ohio River within five minutes in an emergency situation and within forty-five minutes to an hour for a normal cruise. The riverboat had never applied for permanent mooring status. It was connected to a number of land-based utilities and the

owner intended it to be used solely as an indefinitely moored casino.

The *Earls* court looked to *Howard* for guidance and concluded that, like the casino in *Howard*, "the 'Miss Belterra' is a vessel capable of cruising but it is not intended to be used to transport persons or cargo. It had not moved in over two and one-half years at the time of plaintiff's injury, and it has not moved since." *Id.* at 888. The court next examined *Stewart* and emphasized that the United States Supreme Court pointed out that structures "may lose their character as vessels if they have been withdrawn from the water for an extended period of time." *Id.* at 889. Ultimately, the *Earls* court held that the Miss Belterra was not a vessel in navigation:

> The "Miss Belterra," though theoretically capable of being in navigation, was intended to be taken out of navigation by its owner, and was made practically unable to navigate except in emergency situations at the time of the plaintiffs injuries. There is only a remote possibility it will sail again. The "Miss Belterra" was not a vessel in navigation at the time of the plaintiff's injuries. Though vessels withdrawn from navigation can again be returned to navigation (and in the future the Jones Act could apply if the defendant decides to offer gambling "cruises" on the Ohio), the boat's status at the time of plaintiff's injury

> did not expose it's [sic] employees to the perils of the sea.

Id. at 890.

In *Ford v. Argosy Casino Lawrenceburg*, __ F. Supp. 2d __, 2008 U.S. Dist. LEXIS 23558, 2008 WL 817113 (S.D. Ind. Mar. 24, 2008), the Southern District of Indiana considered the same issue—"whether a riverboat casino that is indefinitely moored to the shore is a 'vessel in navigation' for purposes of the federal Jones Act. The answer is no." 2008 U.S. Dist. LEXIS 23558, [*Id.*] at *1. As with the Miss Belterra, the Argosy was indefinitely moored and exclusively operated as a dockside casino beginning in 2002. The casino was not used to transport people or goods on the water and had no transportation function, though it had a full marine crew, was regularly inspected by the United States Coast Guard, was certified as seaworthy, and was capable of commencing navigation within several minutes if need be. After considering the relevant caselaw—including *Stewart*, *Howard*, and *Earls*—the court noted that the employee "has not come forward with evidence that would show that future sailing had become a 'practical possibility' instead of a 'theoretical one' when he was injured." 2008 U.S. Dist. LEXIS 23558, [*Id.*] at *5. Therefore, the court found that the Jones Act did not apply and granted summary judgment in the casino's favor. *See also, e.g.*, *De La Rosa v. St. Charles Gaming Co., Inc.*, 474 F.3d 185, 187 (5th Cir. 2006) (holding that indefinitely moored riverboat casino was not a vessel in navigation for purpose of admiralty

jurisdiction because, although the riverboat "was still physically capable of sailing, such a use was merely theoretical," given that it was indefinitely moored to the land by lines tied to steel pilings, was connected to land-based utilities, had not been used as a seagoing vessel since 1991, and the owners did not intend to use it as such; therefore, "[i]ts operations are entirely gaming-related, and not maritime in nature"); *Martin v. Boyd Gaming Corp.*, 374 F.3d 375, 377 (5th Cir. 2004) (holding that indefinitely moored riverboat casino was not a vessel in navigation under the Jones Act because "[t]he rule has never been 'once a vessel, always a vessel,' [so once the riverboat] was withdrawn from navigation so that transporting passengers, cargo or equipment on navigable water was no longer an important part of the business in which the craft was engaged the craft was not a vessel"); *Wire v. Showboat Marina Casino P'ship*, __ F. Supp. 2d __, 2008 U.S. Dist. LEXIS 22044, 2008 WL 818310, *6 (N.D. Ill. Mar. 20, 2008) (holding that a permanently moored riverboat casino is not a vessel in navigation under the Jones Act, in part because the employee "failed to point to any evidence that shows that the Casino intends to ever move the Riverboat Casino from the dock and turn it again into a vessel in navigation"); *Watson v. Ind. Gaming Co., LP*, 337 F. Supp. 2d 951, 955 (E.D. Ky. 2004) (holding that an indefinitely moored riverboat casino is not a vessel in navigation under the Jones Act because the riverboat "has been indefinitely moored and is no longer used, nor intended to be used, for any river transportation function"). *Contra Bd. of Comm'rs of the Orleans Levee Dist. v. M/V Belle of Orleans*, 535 F.3d 1299, 1312 (11th Cir. 2008)

(holding that riverboat casino was a vessel for the purpose of interpreting a maritime contract giving rise to a maritime lien because the casino "maintained functioning machinery and was capable of moving under her own power . . . all her crew would have had to do was unmoor her cables and start up her engine and the [riverboat] would have been able to sail[; f]urther, . . . the [riverboat] was capable of moving over water"); *Booten v. Argosy Gaming Co.*, 364 Ill. App. 3d 697, 848 N.E.2d 141, 146, 302 Ill. Dec. 141 (Ill. App. Ct. 2006) (holding that indefinitely moored casino was a vessel in navigation because the riverboat "is clearly capable of maritime transportation . . . [and] can be ready to cruise in approximately five to seven minutes if an emergency situation should arise").

In this case, the Riverboat has been moored and stationary since August 2002. It is connected to the land by eight mooring lines, two double-up lines, three fuel hoses, a sewage and water hose, and seven power cables. Since August 2002, the Riverboat has not transported passengers, cargo, or equipment. The Casino's Director of Marine Operations attested as follows:

> 5. The purpose of [the Riverboat] is no longer the transportation of passengers, cargo or equipment on the Ohio River, and has not been so since August 2002.
>
> 6. The [Riverboat] now serves as a platform on which to conduct gaming activities in order to comply with the requirements of

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> Indiana state law concerning casino operations, and is indefinitely moored to its dock. With the exception of tests conducted in compliance with federal regulations, the [Riverboat] has been stationary since August 2002, and will remain indefinitely moored for the foreseeable future.

Appellants' App. p. 26.

Therefore, like the majority of cases in which a riverboat casino was found not to be a vessel in navigation, the Riverboat was theoretically capable of being in navigation but was intended to be removed from navigation and was practically unable to navigate except in emergency situations. *See, e.g.*, *De La Rosa*, 474 F.3d 185 (observing that although the riverboat "was still physically capable of sailing, such a use was merely theoretical"); *Ford*, 2008 U.S. Dist. LEXIS 23558, 2008 WL 817113 at *5 (finding the Jones Act did not apply because the plaintiff failed to "come forward with evidence that would show that future sailing had become a 'practical possibility' instead of a 'theoretical one' when he was injured"); *Earls*, 439 F. Supp. 2d at 890 (emphasizing that although the riverboat was "theoretically capable of being in navigation," it "was intended to be taken out of navigation by its owner, and was made practically unable to navigate except in emergency situations"). It is undisputed that since 2002, the Riverboat's operations have been entirely gaming-related, and not maritime in nature. In other words, the

Riverboat is an indefinitely moored dockside casino with no transportation function or purpose. We agree with the Seventh Circuit that "indefinitely moored dockside casinos are not the kind of vessel that the Jones Act addresses[, given] . . . the statute's purpose of enhancing legal protections for seamen 'regularly exposed to the 'perils of the sea.'" *Howard*, 364 F.3d at 857 (citing *Chandris*, 515 U.S. at 369).

Conder emphasizes that the Coast Guard has continued to inspect the Riverboat and that Caesars has not relinquished its Coast Guard Certificate of Inspection. Conder argues that this fact necessarily means that the Riverboat is a vessel in navigation under the Jones Act. We cannot agree, inasmuch as many other courts have considered indefinitely moored casinos that were registered with and inspected by the Coast Guard and concluded that they were not vessels in navigation under the Jones Act. *See, e.g., Martin*, 374 F.3d at 376; *Howard*, 364 F.3d at 856; *Ford*, 2008 U.S. Dist. LEXIS 23558, 2008 WL 817113, at *2; *Earls*, 439 F. Supp. 2d at 886; *Watson*, 337 F. Supp. 2d at 954. *Cf. Soloman v. Blue Chip Casino, Inc.*, 772 N.E.2d 515, 520 (Ind. Ct. App. 2002) (holding that the mere fact of the Coast Guard's exercise of authority over a boat did not mandate a finding that the boat fell within Jones Act jurisdiction).

Conder also argues that Caesars's intent is irrelevant and that, in any event, the affidavit of the Director of Marine Operations is insufficient to support Caesars's argument. We acknowledge an apparent split between the Circuit Courts of Appeal on the issue of the relevance

of the casino owner's intent to Jones Act applicability. The Fifth and Seventh Circuits have concluded that intent is relevant, while the Eleventh Circuit disagrees, finding intent to be beside the point. *Compare De La Rosa*, 474 F.3d at 187 (finding riverboat casino was not a vessel in navigation, in part because the casino owners' "intent was to use it solely as an indefinitely moored floating casino") *and Tagliere*, 445 F.3d at 1016 (observing that, perhaps, a boat is "'permanently' moored when its owner intends that the boat will never again sail, while if he has not yet decided its ultimate destiny it is only 'indefinitely' moored") *with Belle of Orleans*, 535 F.3d at 1311 (concluding that courts should focus on whether the boat has been rendered practically incapable of transportation or movement rather than the shipowner's intent in determining Jones Act applicability).

We find the approach of the Fifth and Seventh Circuits to be the better one, inasmuch as it is evident that the shipowner's intent is part and parcel of the nature of the ship. If the owner intends to continue to transport passengers from time to time or to continue to take periodic cruises on the river, then that would weigh heavily in favor of a conclusion that the ship is a vessel in navigation. If, on the other hand, the owner intends that the ship be moored indefinitely and that it will never sail again, then that militates in favor of a conclusion that the Jones Act does not apply. While perhaps not dispositive, we believe that the owner's intent is, at least, relevant to the analysis.

Here, it is undisputed that Caesars intended that the Riverboat be moored indefinitely and remain stationary for the foreseeable future. Appellant's App. p. 26. Conder argues that the affidavit of the Director of Marine Operations is insufficient, inasmuch as it merely consists of a series of self-serving statements. Initially, we note that an affidavit supporting or opposing summary judgment is acceptable so long as it is "made on personal knowledge, . . . set[s] forth such facts as would be admissible in evidence, and . . . show[s] affirmatively that the affiant is competent to testify to the matters stated therein." Ind. Trial Rule 56(E). Here, there has been no suggestion that Caesars's affidavit does not meet those requirements.

Furthermore, we note that, in considering Jones Act applicability, courts have routinely relied on similar affidavits. *See, e.g., Wire*, 2008 U.S. Dist. LEXIS 22044, 2008 WL 818310, at *7 (noting that "nothing prohibits the Casino from presenting [an] affidavit as support for its contention concerning the intent of the Casino. . . . The Casino is merely required to present admissible evidence."); *Watson*, 337 F. Supp. 2d at 954 (holding that "[w]hile plaintiff argues that the affidavit of Argosy's manager, who states that the casino has no intention of moving the riverboat on a regular basis in the future, is 'suspect,' plaintiff presents no evidence to cast doubt on her testimony"). Here, likewise, Conder has presented no evidence disputing or casting doubt on the testimony of the Director of Marine Operations regarding Caesars's intent for the Riverboat's operation. Thus, it is undisputed that Caesars does not

intend to resume the Riverboat's maritime operations in the foreseeable future.

In sum, the Riverboat has been moored to the dock since 2002. It has had no transportation function since that time. It is joined to the land by a number of cables. It is connected to land-based utilities. Its owners intend that it remain stationary for the foreseeable future. Thus, the Riverboat's operations are gaming-related, rather than maritime in nature, and that has been the case since 2002. Conder, as a table games dealer for the Casino, is simply not an employee who is regularly—or at all—exposed to "the special hazards and disadvantages to which they who go down to sea in ships are subjected." *McDermott*, 498 U.S. at 354. Under these circumstances, we cannot conclude that the Riverboat is a vessel in navigation or that Conder is the type of employee that the Jones Act is intended to cover and protect. We find, therefore, that the trial court erred as a matter of law by granting Conder's motion for partial summary judgment and denying Caesars's motion to dismiss the Jones Act count of Conder's complaint.[4]

---

4. Conder included a second, alternative, count in her complaint, seeking relief as a seaman pro hac vice—a Sieracki seaman. We infer from the pleadings in the appendices that the Casino included this count in its motion to dismiss. The Casino, however, has not appealed the trial court's order denying its motion to dismiss with regard to the Sieracki seaman count. Indeed, neither party addresses this issue on appeal. Consequently, we remand for further proceedings on this claim.

Appendix D

The judgment of the trial court is reversed in part and remanded with instructions to dismiss Conder's Jones Act claim with prejudice and for further proceedings on her Sieracki seaman claim.

MATHIAS, J., and BROWN, J., concur.

APPENDIX E — ORDER OF THE CIRCUIT COURT OF HARRISON COUNTY, STATE OF INDIANA DATED AND FILED DECEMBER 4, 2007

IN THE CIRCUIT COURT OF HARRISON COUNTY STATE OF INDIANA

CAUSE NO. 31 CO1-0504-PL-18

TINA CONDER,

Plaintiff

V.

RDI/CAESARS RIVERBOAT CASINO, LLC And, M/V GLORY OF ROME,

Defendants

ORDER GRANTING PARTIAL SUMMARY JUDGMENT
(Entry for 11/8/07)

On October 10, 2007, the plaintiff's Motion for Partial Summary Judgment on the issue of Jones Act status and defendant's Motion to Dismiss for lack of jurisdiction were heard and oral argument taken.

PRESENT: Karl Truman, Esq.
Isaac H. Soileau, Jr., Esq. - admitted Pro Hac Vice
Attorneys for Plaintiff

Gene F. Price, Esq.
Attorney for Defendant

Appendix E

Based on the parties' oral argument, legal memoranda containing argument, citations and evidence, the Court finds as follows:

1. That this matter is maritime in nature;

2. That the M/V GLORY OF ROME is a vessel in navigation;

3. That plaintiff's duties contributed to the function and/or mission of the vessel;

4. That plaintiff's connection to the vessel was substantial in duration and nature.

5. That plaintiff Tina Conder is a Jones Act Seaman.

It is therefore, ORDERED AND ADJUDGED that plaintiff's Motion for Partial Summary Judgment is GRANTED on the issue of Jones Act Seaman status and defendant's Motion to Dismiss is DENIED.

SO ORDERED this 4th day of December, 2007.

s/ H. Lloyd Whitis
H. LLOYD WHITIS, JUDGE
HARRISON CIRCUIT COURT

APPENDIX F — ORDER OF THE COURT OF APPEALS OF INDIANA DENYING PETITION TO TRANSFER OF JURISDICTION DATED APRIL 15, 2010

CLERK

SUPREME COURT, COURT OF APPEALS, AND TAX COURT

STATE OF INDIANA

CLERK OF HARRISON CIRCUIT CT.
203 COURTHOUSE
300 NORTH CAPITOL AVENUE
CORYDON, IN 47112

Cause Number

31A01-0907-CV-00348
Lower Court Number:
31C010504PL18

CONDER, TINA

V.

RDI/CAESARS RIVERBOAT CASINO LLC ET AL

You are hereby notified that the SUPREME COURT has on this day 4/15/10

Appendix F

THIS MATTER HAS COME BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER JURISDICTION FOLLOWING THE ISSUANCE OF A DECISION BY THE COURT OF APPEALS. THE PETITION WAS FILED PURSUANT TO APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS. ANY RECORD ON APPEAL THAT WAS SUBMITTED HAS BEEN MADE AVAILABLE TO THE COURT FOR REVIEW, ALONG WITH ANY AND ALL BRIEFS THAT MAY HAVE BEEN FILED IN THE COURT OF APPEALS AND ALL THE MATERIALS FILED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE PETITION. EACH PARTICIPATING MEMBER HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICE'S VIEWS ON THE CASE IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER OF JURISDICTION.

RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR.

s/ [Kevin S. Smith]
Clerk, Supreme Court,
Court of Appeals and Tax Court

APPENDIX G — 33 U.S.C. § 901

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT
33 U.S.C. § 901 *et seq.* as amended in 1984

SHORT TITLE

EXCLUSIVENESS OF REMEDY AND THIRD PARTY LIABILITY

Sec. 5. (a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action, the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. *For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4.*

Appendix G

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. *If such person was employed to provide ship building, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.*

(c) In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this Act by virtue of section 4 of the Outer Continental Shelf Lands Act (43 U.S.C. 1333), then such person, or

anyone otherwise entitled to recover damages by reason thereof, may bring action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision, whereby the employer of a person entitled to receive benefits under this Act by virtue of section 4 of the Outer Continental Shelf Lands Act (43 U.S.C. § 1333) and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

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(2)

Supreme Court, U.S.
FILED
AUG 13 2010
OFFICE OF THE CLERK

No. 10-102

IN THE

Supreme Court of the United States

TINA CONDER,

Petitioner,

v.

RDI/CAESARS RIVERBOAT CASINO, INC.
and M/V GLORY OF ROME,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARIT TO THE
INDIANA COURT OF APPEAL

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether 28 U.S.C. § 1257(a) provides the Supreme Court with jurisdiction over the "vessel status" of an indefinitely moored casino boat where the Plaintiff failed to file a timely Petition to Transfer to the Indiana Supreme Court after the Indiana Court of Appeals ruled on the "vessel status" issue in an earlier appeal, *RDI/Caesars Riverboat Casino, Inc. v. Conder*, 896 N.E.2d 1172 (Ind. Ct. App. 2008) ("*Caesars I*"), and where, in a later appeal, *Conder v. RDI/Caesars Riverboat Casino, Inc.*, 918 N.E.2d 759 (Ind. Ct. App. 2009) ("*Caesars II*"), in which Plaintiff attempted to improperly again raise the "vessel status" issue, the Indiana Court of Appeals declined to revisit the holding of *Caesars I* and struck the "vessel status" issue from Plaintiff's briefs.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

RDI/Caesars Riverboat Casino, Inc. has two members, Roman Holding Corporation of Indiana (82% ownership) and Harrah's Operating Company, Inc. (18% ownership). No publicly held company owns 10% or more of the corporation's stock.

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I. As Plaintiff failed to file a timely Petition to Transfer to the Indiana Supreme Court after the Indiana Court of Appeals issued its decision on "vessel status" in *Caesars I*, the "vessel status" issue was not appealed to the highest court of the State of Indiana in which a decision could have been had and therefore, the U.S. Supreme Court lacks jurisdiction over the waived "vessel status" issue under 28 U.S.C. § 1257(a).	4

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II. In any event, in addition to the fact that Plaintiff cannot establish jurisdiction, the 2008 *Caesars I* decision relative to vessel status was correctly decided. 15

III. The 2009 *Caesars II* decision relative to Plaintiff's Sieracki Seaman Claim was also correctly decided. 19

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STATEMENT OF THE CASE

Facts relevant to this Brief in Opposition were succinctly stated in *RDI/Caesars Riverboat Casino, Inc. v. Conder*, 896 N.E.2d 1172, 1173-1174 (Ind. Ct. App. 2008)(*Caesars I*):

> Caesars operates a casino (the Casino) on the riverboat M/V Glory of Rome (the Riverboat). The Riverboat is a passenger vessel that is registered with and regularly inspected by the U.S. Coast Guard. It has its own engines and machinery, as well as navigation, lifesaving, and fire-fighting equipment.
>
> In August 2002, the Casino began exclusively conducting dockside gambling pursuant to amendments to Indiana state law that allowed casinos to stop cruising and conduct gaming while dockside. Since that time, the Riverboat has been moored and stationary with the exception of rare tests conducted in compliance with federal regulations. It is connected to the dock by eight mooring lines, two double-up lines, three fuel hoses, a sewage and water hose, and seven power cables. Since August 2002, the Riverboat has not transported passengers, cargo, or equipment.
>
> Beginning in March 2002, Conder was employed as a table games dealer in the Casino. On August 19, 2003, and on subsequent occasions, Conder was repeatedly bitten by fleas during the course of her

> employment at the Casino. Treatment for her adverse reaction to the flea bites included large doses of steroids, which allegedly caused her to have a heart attack.
>
> On April 26, 2005, Conder filed a complaint against Caesars, seeking compensation for her injuries based on the Jones Act or, in the alternative, pursuant to Indiana worker's compensation laws as a seaman pro hac vice—a Sieracki seaman. On March 26, 2007, Caesars filed a motion to dismiss the complaint pursuant to *Indiana Trial Rule 12(B)(1)*. On May 15, 2007, Conder filed a motion for partial summary judgment, seeking a declaration as a matter of law that she is a Jones Act Seaman. The [Harrison Circuit Court] held a hearing on the motion to dismiss and the motion for partial summary judgment on October 10, 2007, and on December 4, 2007, the trial court summarily denied Caesars's motion and granted Conder's motion. Caesars now appeals.

On November 25, 2008, the Indiana Court of Appeals issued its decision ("*Caesars I*") in which it found that the trial court erred as a matter of law by granting Conder's motion for partial summary judgment and denying Caesars's motion to dismiss the Jones Act count of Conder's complaint. The judgment of the trial court was reversed in part and remanded with instructions to dismiss Conder's Jones Act claim with prejudice and for further proceedings relating to the remaining Sieracki seaman claim. 896 N.E.2d at 1181. Conder did

not seek a rehearing of *Caesars I* and filed an untimely Petition to Transfer to the Indiana Supreme Court, which dismissed the belated transfer request and declined to consider it.

In a subsequent appeal (i.e. *Caesars II*), the Indiana Court of Appeals said:

> On March 25, 2009, Caesars filed a motion to dismiss Conder's complaint, including her claims seeking relief under the Jones Act and as a Sieracki seaman. On April 3, 2009, the trial court granted the motion with respect to the Jones Act claims, and on June 1, 2009, the trial court summarily dismissed Conder's remaining claims, including the Sieracki seaman claim. Conder now appeals.

Conder v. RDI/Caesars Riverboat Casino, Inc., 918 N.E.2d 759, 762 (Ind. Ct. App. 2009). *Caesars II* affirmed the trial court's dismissal of the remainder of the case. Plaintiff's Petition to Transfer *Caesars II* to the Indiana Supreme Court was denied on April 15, 2010.

REASONS FOR DENYING THE PETITION

I. As Plaintiff failed to file a timely Petition to Transfer to the Indiana Supreme Court after the Indiana Court of Appeals issued its decision on "vessel status" in *Caesars I*, the "vessel status" issue was not appealed to the highest court of the State of Indiana in which a decision could have been had and therefore, the U.S. Supreme Court lacks jurisdiction over the waived "vessel status" issue under 28 U.S.C. § 1257(a).

The entirety of Plaintiff's Petition for a Writ of Certiorari is dedicated to the sole issue of vessel status. In other words, Plaintiff argues that because the indefinitely moored casino where she worked at the time of her alleged injury should still be considered a vessel in navigation, she is entitled to file suit against her employer as either a Jones Act or Sieracki seaman. However, after the Indiana Court of Appeals ruled against Conder on the vessel status issue back in 2008, she failed to file a timely Petition to Transfer to the Indiana Supreme Court. As a consequence, pursuant to 28 U.S.C. § 1257(a), the U.S. Supreme Court has no jurisdiction to hear the vessel status issue, which is the gravamen of the Petition for Writ of Certiorari.

On November 25, 2008, the Indiana Court of Appeals in *Caesars I* held that the indefinitely moored casino in which the Plaintiff worked was not a vessel in navigation. In this regard, it explained, "we agree with the Seventh Circuit that indefinitely moored dockside casinos are not the kind of vessel that the Jones Act addresses, given the statute's purpose of enhancing legal protections for

seaman regularly exposed to the perils of the sea." *RDI/Caesars Riverboat Casino, Inc. v. Conder*, 896 N.E.2d 1172, 1179 (Ind. Ct. App. 2008) *citing Howard v. S. Ill. Riverboat Casino Cruises, Inc.*, 364 F.3d 854, 857 (7th Cir. 2004). *Caesars I* also held, "we cannot conclude that the Riverboat is a vessel in navigation or that Conder is the type of employee that the Jones Act is intended to cover and protect." 896 N.E.2d at 1181. The Indiana Court of Appeals further ruled that "the trial court erred as a matter of law by granting Conder's motion for partial summary judgment and denying Caesar's motion to dismiss the Jones Act count of Conder's complaint." *Id. Caesars I* remanded the case with an instruction to dismiss Conder's Jones Act claim. *Id.* at 1173.

Caesars I is dated November 25, 2008. *Id.* at 1172. Under Indiana Rule of Appellate Procedure 57(C)(1), a Petition to Transfer to the Indiana Supreme Court shall be filed no later than thirty (30) days after the adverse decision if rehearing was not sought. Conder did not ask the Indiana Court of Appeals for a rehearing of *Caesars I*. *Conder v. RDI/Caesars Riverboat Casino, Inc.*, 918 N.E.2d 759, 762 (Ind. Ct. App. 2009). Instead, on December 31, 2008, Conder filed both a Petition to Transfer and a verified motion for permission to file a belated Petition to Transfer with the Indiana Supreme Court.

However, in an opinion dated January 5, 2009, the Indiana Supreme Court refused to accept the untimely Petition and further said:

> Appellee, by counsel, files a "Verified Motion For Permission To File Belated Petition To

> Transfer" ("Motion"). The Court of Appeals issued its decision on November 25, 2008, and a rehearing or transfer petition was due on December 29, 2008. Appellee's petition to transfer was tendered on December 31, 2008. The Motion asserts that the petition to transfer was tendered belatedly due to a miscommunication between Appellee's co-counsel. Appellee requests leave to file belatedly her petition to transfer.
>
> The Court appreciates counsel's candid explanation of why Appellee's petition was untimely. However, Appellate Rules 35(C) and 57(C), (D) and (E) provide that no extensions of time will be granted to file a petition to transfer, a brief in response to a petition to transfer, or a reply to a brief in response to a petition to transfer. Given the cause of Appellee's untimeliness was not outside of Appellee's counsel's control, this is not the type of extraordinary circumstances in which the Court might otherwise consider deviating from our unambiguous rules.
>
> Being duly advised, the Court now DENIES the Motion. The Court directs the Clerk to return the tendered petition and all copies to counsel for Appellee.

See also Caesars II, 918 N.E.2d at 762 ("Conder did not seek rehearing [of *Caesars I*] and filed an untimely request for transfer to our Supreme Court, which dismissed the transfer request and declined to consider

it.").[1] Conder also did not seek U.S. Supreme Court review of the Indiana Supreme Court's denial of her motion to file an untimely Petition to Transfer in *Caesars I*.

Under Indiana law, the law of the case doctrine provides that "an appellate court's determination of a legal issue is binding both on the trial court on remand and the appellate court on a subsequent appeal, given the same case with substantially the same facts." *Indiana Farm Gas Prod. Co. v. Southern Ind. Gas and Elec. Co.*, 662 N.E.2d 977, 981 (Ind. Ct. App.1996) *citing Cha v. Warnick*, 476 N.E.2d 109, 114 (Ind. 1985), *reh'g denied*, *cert. denied*, 474 U.S. 920, 106 S. Ct. 249. "The doctrine is based upon the sound policy that when an issue is once litigated and decided, that should be the end of the matter." *Id.* "Indiana has applied this doctrine in its strictest sense and has resisted creating exceptions to the strict application of the doctrine." *Id.*

In the Statement of the Case found in Conder's Petition for Writ of Certiorari, Plaintiff makes no mention of either her untimely Petition to Transfer or the Indiana Supreme Court's decision denying Plaintiff's motion to file a belated Petition. This omission from the Statement of the Case amounts to a material misrepresentation. In short, Plaintiff is attempting to obfuscate the fact that her attorneys missed an important deadline and, as a result, failed to satisfy a necessary requirement for obtaining U.S. Supreme

---

1. Plaintiff did not include the January 5, 2009 Order of the Indiana Supreme Court in the Appendix attached to her Petition for Writ of Certiorari.

Court review under 28 U.S.C. § 1257(a), which is "obtaining a final judgment from the highest court in which a decision could be had."

Following *Caesars I*, Conder's case continued before the trial court on a different issue not entirely decided by the first appeal. On March 25, 2009, Caesars filed a motion to dismiss the entire case. 918 N.E.2d 759, 762. Then, "on June 1, 2009, the trial court summarily dismissed Conder's remaining claims, including the Sieracki seaman claim." *Id.* Conder then filed a second appeal. *Id.*

On December 31, 2009, the Indiana Court of Appeals issued its decision in *Caesars II*. 918 N.E.2d 759. In its decision, the Indiana Court of Appeals summarized Plaintiff's second appeal as follows, "Conder argues that we should reconsider our opinion in the prior appeal in this matter and that the trial court erroneously dismissed her claim against Caesars based on her alleged status as a Sieracki seaman." *Id.* at 761. *Caesars II* then separately addressed Conder's Jones Act and Sieracki Seaman Claims and affirmed the trial court's dismissal of the case. *Conder*, 918 N.E.2d at 762-763.

However, the entirety of the Indiana Court of Appeals decision in *Caesar II* relative to the vessel status issue consists of the following four sentences:

> I. Jones Act
>
> Conder's primary argument on appeal is that *Caesars I* was incorrectly decided. In support of this position, she makes precisely the same

> arguments she made in the first appeal of this matter. We decline to revisit the holding of *Caesars I*. Additionally, contemporaneously with this opinion, we are entering an order granting Caesars's motion to strike this issue from Conder's briefs and granting Conder's motion to strike the portion of Caesars's appendix including the briefs and appendix filed in *Caesars I*.

Id. at 762. In a pattern that repeats itself, Plaintiff's Statement of the Case does not explain to this Court that in *Caesars II*, the Indiana Court of Appeals struck the vessel status arguments from Conder's briefs as being improperly before that court in the second appeal. Under the law of the case doctrine, the vessel status issue was previously decided in *Caesars I*, a decision that is not before this Court.

In her statement of the basis for jurisdiction in this Court, Plaintiff states that the decision being appealed is the December 31, 2009 judgment of the Indiana Court of Appeals or *Caesars II*. This is false. The vessel status issue was not properly before the Indiana Court of Appeals in *Caesars II*. *Caesars II* refused to reconsider its prior decision and struck Plaintiff's briefs on the issue of vessel status.

Put bluntly, Plaintiff missed her opportunity to appeal the vessel status issue beyond the Indiana Court of Appeals when she failed to file a timely Petition to Transfer to the Indiana Supreme Court following the earlier 2008 decision in *Caesars I*. *See Downes v. Scott*, 45 U.S. 500, 11 L. Ed. 1075 (1846); *Fisher v. Perkins*,

122 U.S. 522, 7 S. Ct. 1227 (1887); and *Banks v. California*, 395 U.S. 708, 89 S. Ct. 1901 (1969). Plaintiff cannot circumvent the Indiana Supreme Court's January 5, 2009 decision denying her motion to file a belated Petition to Transfer by wrongly raising the issue for a second time in a subsequent appeal. The mistake that was made over a year and a half ago has consequences and cannot be undone.

Ignoring the clear history of this case before the Indiana courts, Conder files her Petition for Writ of Certiorari as if the issue of vessel status only became final after the Indiana Supreme Court denied Plaintiff's Petition to Transfer following *Caesar II*. This is a grand fiction. Indeed, Plaintiff's Petition for Writ of Certiorari does not even argue that the Indiana Court of Appeals committed any error in *Caesars II* when it not only refused to reconsider *Caesars I* but struck the vessel status issue from Conder's briefs. Thus, there is simply no dispute that the vessel status issue was finally decided in 2008 in *Caesars I*.

The awkwardness of Plaintiff's Petition for Writ of Certiorari is revealed by the fact that nowhere does her argument relative to vessel status even refer to *Caesars II*, the very decision from which she is supposedly seeking U.S. Supreme Court review. Conder does not refer to *Caesars II* in the context of vessel status because other than stating that it was not going to reconsider *Caesars I*, *Caesars II* says nothing about vessel status. To the contrary, the purported split of authority among the federal circuits on the issue of vessel status that is discussed in the Petition for Writ of Certiorari was addressed in *Caesars I* not *Caesars II*.

Instead of expressly stating that she is seeking an appeal of the 2008 decision in *Caesars I*, Conder merely cites to *Caesars I* on page 7 of her Petition for Writ of Certiorari for the proposition that "some courts have held that since the vessels are no longer required to sail they are no longer vessels in navigation." Then, on page 13 of her Petition, Plaintiff states, "the primary issue in this matter was whether or not the GLORY OF ROME was in navigation at the time of Ms. Conder's injury." Accordingly, despite Plaintiff's representation in her statement of the basis for jurisdiction in this Court, the current Petition for Writ of Certiorari regarding *Caesars II* is actually a sleight-of-hand attempt to obtain a review of *Caesars I*.

In her Petition for a Writ of Certiorari, Plaintiff asserts that this Court has jurisdiction to hear this case under 28 U.S.C. § 1257(a), which provides:

> § 1257. State courts; certiorari
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

However, in regard to 28 U.S.C. § 1257(a), this Court has previously explained:

> With 'very rare exceptions,' *Yee v. Escondido, 503 U.S. 519, 533, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992)*, we have adhered to the rule in reviewing state court judgments under *28 U.S.C. § 1257* that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review. See *Heath v. Alabama, 474 U.S. 82, 87, 88 L. Ed. 2d 387, 106 S. Ct. 433 (1985)*; *Illinois v. Gates, 462 U.S. 213, 217-219, 76 L. Ed. 2d 527, 103 S. Ct. 2317 (1983)*; *McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434, 84 L. Ed. 849, 60 S. Ct. 670 (1940)*. As petitioners concede here, the Alabama Supreme Court did not expressly address the question on which we granted certiorari. See Reply Brief for Petitioners 2-3, n. 1.
>
> Nor have petitioners met their burden of showing that the issue was properly presented to that court. When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 550, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987)*, and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb v. Webb, 451 U.S. 493, 501, 68 L. Ed. 2d*

> *392, 101 S. Ct. 1889 (1981)*. We have described in different ways how a petitioner may satisfy this requirement. See *Street v. New York, 394 U.S. 576, 583-585, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969)*. In some cases, we have focused on the need for petitioners either to establish that the claim was raised "'at the time and in the manner required by the state law,'" *Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 77-78, 100 L. Ed. 2d 62, 108 S. Ct. 1645 (1988)* (quoting *Webb, supra, at 501*)), see, *e.g., Exxon Corp. v. Eagerton, 462 U.S. 176, 181, n. 3, 76 L. Ed. 2d 497, 103 S. Ct. 2296 (1983)*; *Beck v. Washington, 369 U.S. 541, 549-554, 8 L. Ed. 2d 98, 82 S. Ct. 955 (1962)*, or to persuade us that the state procedural requirements could not serve as an independent and adequate state law ground for the state court's judgment, see, *e.g., Hathorn v. Lovorn, 457 U.S. 255, 262-265, 72 L. Ed. 2d 824, 102 S. Ct. 2421 (1982)*. In other cases, we have described a petitioner's burden as involving the need to demonstrate that it presented the particular claim at issue here with "fair precision and in due time," *New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67, 73 L. Ed. 184, 49 S. Ct. 61 (1928)*; *PruneYard Shopping Center v. Robins, 447 U.S. 74, 85, n. 9, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980)*.

Adams v. Robertson, 520 U.S. 83, 86-87, 117 S. Ct. 1028, 1029-1030 (1997). *See also Banks*, 395 U.S. at 708:

> Petitioner did not ask the Supreme Court of California to review the judgment entered by

> the Court of Appeal in this case. Therefore, the decision of the Court of Appeal is not a 'final judgment . . . rendered by the highest court of a State in which a decision could be had . . . .' 28 U. S. C. § 1257, and we lack jurisdiction to review it.

Here, the Indiana Supreme Court was silent on the vessel status issue presented by this case. Moreover, Conder makes no effort to establish that the vessel status issue was ever properly presented to the Indiana Supreme Court or that said court was afforded a fair opportunity to address the issue. Instead, the record establishes the exact opposite.

In sum, Plaintiff's motion to file a belated Petition to Transfer following *Caesars I* was denied by the Indiana Supreme Court and, in *Caesars II*, the Indiana Court of Appeals refused to reconsider the vessel status issue and struck arguments on the issue from Plaintiff's briefs. Conder cannot hide from these inconvenient facts. More importantly, she cannot establish that the vessel status issue was raised before the Indiana Supreme Court with either "fair precision and in due time" or "at the time and in the manner required by state law." The fact that Plaintiff's Petition for Writ of Certiorari does not even recount the unfavorable history relative to her untimely Petition to Transfer underscores this point.

Moreover, Conder's Petition for Writ of Certiorari also fails to satisfy U.S. Supreme Court Rule 10(b), which is one of the compelling reasons the Court considers when it is determining whether to exercise its discretion

to review a case on a writ of certiorari. Under Rule 10(b), this Court may grant a writ of certiorari when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." *See also Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 917-18, 70 S.Ct. 252, 254-55 (1950). Again, in this case, the vessel status issue was not decided by (or even properly presented to) the "state court of last resort" because Plaintiff failed to file a timely Petition to Transfer to the Indiana Supreme Court following *Caesars I*.

Accordingly, in regard to the vessel status issue, this Court is without jurisdiction and the Petition for Writ of Certiorari should be denied.

II. In any event, in addition to the fact that Plaintiff cannot establish jurisdiction, the 2008 *Caesars I* decision relative to vessel status was correctly decided.

If one was only to read the "Reasons for Granting the Petition" found in Plaintiff's Petition for Writ of Certiorari, he or she would not know that *Caesars I* carefully and properly analyzed the impact of *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 125 S.Ct. 1118 (2005) on the vessel status issue in this case. 896 N.E.2d at 1175-1177. Indeed, even a cursory review of *Caesars I* reveals that immediately after acknowledging that "the primary issue in this appeal is whether the Riverboat is a vessel in navigation under the Jones Act," the Indiana Court of Appeals explained that "the United States Supreme Court's most recent

exploration of this issue occurred in *Stewart v. Dutra*." 896 N.E.2d at 1175. Then, *Caesars I* expressly recognized *Stewart's* conclusion that "the term 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 896 N.E.2d at 1175. Accordingly, as *Caesars I* followed *Stewart's* guidance relative to the correct definition of a vessel, it is unclear why the first question presented for review in the Petition for Writ of Certiorari has to do with an alleged need to reaffirm the application of the definition of a vessel found in 1 U.S.C. § 3.

Furthermore, *Caesars I* focused on a key passage in *Stewart* that is directly applicable to this case. In fact, *Caesars I* quoted *Stewart's* holding that "a watercraft is not capable of being used for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement." 896 N.E.2d at 1175 *citing* 543 U.S. at 494. Of course, *Stewart* itself cited to *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) for the proposition that a "floating casino was no longer a vessel where it was moored to the shore in a semi-permanent or indefinite manner." 543 U.S. at 494. This Court's reference to *Pavone* in *Stewart* was a pinpoint cite to page 570 of that Fifth Circuit Court of Appeals decision. *Stewart*, 543 U.S. at 494. The central point contained on page 570 of *Pavone* is that "there can be little doubt that indefinitely moored, shore-side, floating casinos . . . must be added to [the list of non-vessels]." 52 F.3d at 570. Accordingly, contrary to Plaintiff's protestations, *Caesars I* not only applied *Stewart* but is entirely consistent with *Stewart*.

Factually, *Caesars I* found that "the Riverboat has been moored to the dock since 2002" and "has had no transportation function since that time." 896 N.E.2d at 1181.[2] It also held that the casino "is connected to the dock by eight mooring lines, two double-up lines, three fuel hoses, a sewage and water hose, and seven power cables." *Id.* at 1173. In addition, "it is undisputed that Caesars intended that the Riverboat be moored indefinitely and remain stationary for the foreseeable future." *Id.* at 1180.

Thus, when the Indiana Court of Appeals held in 2008 that "we cannot conclude that the Riverboat is a vessel in navigation or that Conder is the type of employee that the Jones Act is intended to cover and protect," its finding was well grounded in fact and law. *Caesars I* also cited to numerous prior cases in which similar indefinitely moored dockside casinos were held not to be vessels in navigation for purposes of the Jones Act. *See e.g. Howard v. S. Ill. Riverboat Casino Cruises, Inc.*, 364 F.3d 854, 857 (7th Cir. 2004)("An indefinitely

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2. On page 15 of her Petition for Writ of Certiorari, Plaintiff asserts, "as evidenced by Ms. Conder's affidavit filed in her opposition to the motion for summary judgment the GLORY OF ROME did, in fact, sail on several occasions subsequent to the implementation of the 'no sailing' legislation." However, no such facts appear in either *Caesars I* or *Caesars II*. Moreover, Caesars never filed a motion for summary judgment in this case. 896 N.E.2d 1172, 918 N.E.2d 759. A review of Plaintiff's Statement of the Case also fails to establish that Caesars ever filed a motion for summary judgment. Furthermore, nowhere in her Petition for Writ of Certiorari does Plaintiff state that she is seeking to appeal any factual findings of the Indiana Court of Appeals.

moored dockside casino with no transportation function or purpose is not a vessel 'in navigation.'); *Earls v. Belterra Resort*, 439 F. Supp. 2d 884, 890 (S.D. Ind. 2006)

> The Miss Belterra, though theoretically capable of being in navigation, was intended to be taken out of navigation by its owner, and was made practically unable to navigate except in emergency situations at the time of the plaintiff's injuries. There is only a remote possibility it will sail again. The Miss Belterra was not a vessel in navigation.

Ford v. Argosy Casino Lawrenceburg, 2008 U.S. Dist. LEXIS 23558 (S.D. Ind. 2008)(Finding that a riverboat casino that is indefinitely moored to the shore is not a vessel in navigation for purposes of the Jones Act.); *De La Rosa v. St. Charles Gaming Co.*, 474 F.3d 185, 188 (5th Cir. 2006)("Even after *Stewart*, an indefinitely moored floating casino . . . is not a 'vessel' for purposes of admiralty jurisdiction."); *Martin v. Boyd Gaming Corp.*, 374 F.3d 375 (5th Cir. 2004) (Holding that an indefinitely moored dockside casino that previously cruised was no longer a vessel in navigation under the Jones Act because "the rule has never been once a vessel, always a vessel."); *Wire v. Showboat Marina Casino P'ship*, 2008 U.S. Dist. LEXIS 22044 (N.D. Ill. 2008)(Dockside casino that no longer left the dock was not a vessel in navigation under the Jones Act.); and *Watson v. Ind. Gaming Co. LP*, 337 F. Supp. 2d 951, 955 (E.D. Ky. 2004)("Because the *M/V Argosy VI* has been indefinitely moored and is no longer used, nor intended to be used, for any river transportation function, it is not a 'vessel in navigation' for purposes of the Jones Act.").

III. The 2009 *Caesars II* decision relative to Plaintiff's Sieracki Seaman Claim was also correctly decided.

As explained in *Caesars II*, without the existence of a vessel, Plaintiff's Sieracki seaman claim also fails. 896 N.E.2d at 763. Indeed, the Sieracki seaman doctrine is a theory of recovery based upon a vessel's alleged breach of the warranty of seaworthiness. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872 (1946). In this regard, "the duty to furnish a seaworthy vessel can only attach to a vessel in navigation." *Carter v. Bisso Marine Co.*, 238 F. Supp. 2d 778, 784 (E.D. La. 2002) *citing Roper v. United States*, 368 U.S. 20, 23-24, 82 S.Ct. 5, 7 (1961).

However, in this case, the vessel status issue was decided back in 2008 in *Caesars I*. 896 N.E.2d 1172. *Caesars II* expressly acknowledged, "we have already found in *Caesars I* that an indefinitely moored dockside casino with no transportation function or purpose does not qualify as a vessel in navigation." 918 N.E.2d at 763. *Caesars II* went on to explain that "under these circumstances, we find, likewise, that the Riverboat does not qualify as a 'vessel' for the purposes of a Sieracki claim." *Id.*

In sum, *Caesars I* made the factual findings and legal rulings that form the foundation of the Sieracki seaman decision in *Caesars II*. Under the law of the case doctrine, *Caesars II* was bound to follow the vessel status ruling in *Caesars I*. Accordingly, just like her Jones Act claim, Plaintiff forfeited the right to appeal the vessel status element of her Sieracki seaman claim when she failed to file a timely Petition to Transfer *Caesars I* to the Indiana Supreme Court.

CONCLUSION

Contrary to the assertions of Plaintiff's Petition for Writ of Certiorari, Petitioner is actually seeking a review of the 2008 decision of *Caesars I* not the 2009 decision of *Caesars II*. As the Petitioner failed to file a timely Petition to Transfer to the Indiana Supreme Court following *Caesars I*, the vessel status issue was never the subject of a final judgment or decree rendered by the highest court of the State of Indiana in which a decision could have been had (i.e. the Indiana Supreme Court). Accordingly, Plaintiff's claim that this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) is incorrect. In addition and while it is now too late to seek Supreme Court review on the issue, the Indiana Court of Appeals in *Caesars I* correctly decided the issue of vessel status.

Respectfully submitted,

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APPENDIX

APPENDIX A – ORDER OF THE INDIANA SUPREME COURT DATED AND FILED JANUARY 5, 2009

IN THE INDIANA SUPREME COURT

Court of Appeals Cause No. 31A04-0802-CV-40

Trial Court Cause No. 31C01-0504-PL-18

RDI/CAESARS RIVERBOAT CASINO, INC., et al.,

Appellants,

v.

TINA CONDER,

Appellee.

ORDER DENYING MOTION TO FILE BELATED TRANSFER PETITION

Appellee, by counsel, files a "Verified Motion For Permission To File Belated Petition To Transfer" ("Motion"). The Court of Appeals issued its decision on November 25, 2008, and a rehearing or transfer petition was due on December 29, 2008. Appellee's petition to transfer was tendered on December 31, 2008. The Motion asserts that the petition to transfer was tendered belatedly due to a miscommunication between Appellee's co-counsel. Appellee requests leave to file belatedly her petition to transfer.

Appendix A

The Court appreciates counsel's candid explanation of why Appellee's petition was untimely. However, Appellate Rules 35(C) and 57(C), (D) and (E) provide that no extensions of time will be granted to file a petition to transfer, a brief in response to a petition to transfer, or a reply to a brief in response to a petition to transfer. Given the cause of Appellee's untimeliness was not outside of Appellee's counsel's control, this is not the type of extraordinary circumstances in which the Court might otherwise consider deviating from our unambiguous rules.

Being duly advised, the Court now DENIES the Motion. The Court directs the Clerk to return the tendered petition and all copies to counsel for Appellee.

The Clerk is directed to send copies of this order to all counsel of record.

Done at Indianapolis, Indiana, this 5th day of January, 2009

Randall T. Shephard
Chief Justice of Indiana

APPENDIX B — 28 U.S.C. § 1257

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.